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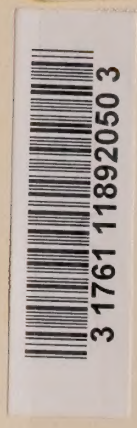


Ontario Energy Board

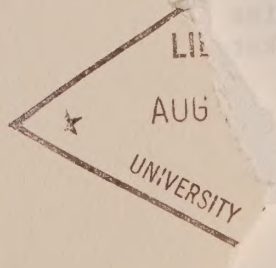
REASONS FOR DECISION

in the matter of certain applications
under the Ontario Energy Board Act by

Bentpath Pool Landowners

E.B.O. 64(1)&(2)

July 16, 1982



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Ontario Energy Board

E.B.O 64(1)&(2)

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, c. 332;

AND IN THE MATTER OF certain applications to the Ontario Energy Board in respect of the Bentpath Pool to make determinations pursuant to s.21 of the Act and to rescind or vary Orders E.B.O. 46 and E.B.O. 64.

BEFORE: S. J. Wychowanec, Q.C.
Vice-Chairman and
Presiding Member

J. C. Butler
Member

REASONS FOR DECISION

Appearances*

J. A. Giffen, Q.C.	-	for the Applicants, with the exception of the Higgs family
J. J. Robinette, Q.C. L. G. O'Connor, Q.C. J. B. Gee, Q.C.	-	for Union Gas Limited ("Union")
P. Y. Atkinson	-	for The Consumers' Gas Company Ltd. and Tecumseh Gas Storage Limited ("Tecumseh")
J. A. Ryder, Q.C.	-	for the City of Kitchener
B. Carroll	-	for the Industrial Gas Users Association
M. Robb on behalf of W. E. Tennyson	-	for certain landowners in the Payne Pool and the Waubuno Pool
Ms. Francoise Bureau	-	for Gaz Metropolitain, inc.
Byron Young	-	for himself

C. E. Woollcombe, Q.C.) - for the Ontario Energy Board
L. Graholm) ("the Board")

*1. The appearances do not include appearances before the Board in preliminary hearings or on Motions relating to any of the applications or the consolidated application.

2. Messrs. Atkinson, Ryder, Robb and Tennyson and Ms. Bureau did not actively participate in the hearing.

3. The Higgs family was not represented at the hearing.

PART I

The Applications

By Board Order dated November 4, 1981, applications under dockets E.B.O. 64(1), E.B.O. 64(2) and E.B.O. 64(1)&(2)-C were consolidated under docket E.B.O. 64(1)&(2) bearing the style of cause set out above and a commencement date of December 1, 1981 was set for hearing the consolidated applications. These Reasons for Decision pertain to all the applications consolidated by that Order.

A historical background and a brief summary of the various applications filed is necessary for a better understanding of the issues involved in this hearing.

The Bentpath Pool is situated in the Township of Dawn in the County of Lambton and lies under some 767.43 acres of land that had been designated as a gas storage area by O. Reg. 585/74 made August 7, 1974 and filed August 19, 1974. By Board Order E.B.O. 64 dated

August 19, 1974 the Board authorized Union to inject gas into, store gas in and remove gas from, the Bentpath Pool and to enter into and upon the designated lands and to use them for such purpose.

The process began with an application filed on July 26, 1977 on behalf of George Arthur Higgs, Walter Reginald Higgs and Ruth Maxine Higgs, in her personal capacity and as executrix of the Estate of the late Gordon Wesley Higgs, under section 21(3) of the Ontario Energy Board Act ("the Act"). This application ("the Higgs Application") was assigned docket number E.B.O. 64(1). It recited the progress of the negotiations which began in October 1974 between certain landowners, including the Higgs family, and Union with respect to gas storage rights in the Bentpath Pool.

The Higgs Application stated that negotiations had ended in failure and, since there was no gas storage agreement between the Higgs family and Union, requested the Board to determine compensation payable for storage rights pursuant to section 21(3) of the Act.

The Board directed that the Higgs Application be served on Union, Tecumseh, the Township of Dawn, the Ministry of Natural Resources and all persons having an interest in the northwest quarter of Lot 30, Concession 5, in the Township of Dawn.

On November 18, 1977, Union responded to the Higgs Application with a Demand for Particulars in which it stated that it intended to file an Answer, but that

the application was defective in that it did not set forth the relief or remedy to which the Higgs family claimed to be entitled. This was the first move in a long procedural battle which took place over several years between all the Applicants and Union and which, from the vantage point of the Board, would often have been unnecessary had the parties in this hearing shown a degree of co-operation one with the other and greater care in preparing their material.

Mr. R. A. Blackburn, counsel for the Higgs family, did not reply to the Demand for Particulars until April 1978. Union found the reply to be unsatisfactory and brought a motion requiring the Higgs to file full particulars of the relief or remedy sought.

Eventually the Higgs family submitted that "fair, just and equitable compensation" for gas storage rights in the Bentpath Pool should be an annual payment by Union of 2 percent of the residential retail price of natural gas per thousand cubic feet multiplied by the number of thousand cubic feet of storage capacity of the pool apportioned to the Higgs on the basis of the percentage that the lands owned by them bears to the total lands in the pool. In addition a well payment of $500 per year was claimed. All such payments were to be calculated on January 1 in each and every year and be payable on or before February 1 in each year.

It is not necessary for purposes of these Reasons for Decision to mark every milestone of the Higgs Application. Suffice to say that it was not until April 9, 1979, that Union filed its Answer to the Higgs formula and stated that fair, just and equitable compensation was $7.00 per acre per year as determined in Board Order E.B.O. 46 and paid to the Higgs since 1974. Union also pointed out that, as there were no wells on the Higgs property, the payment of $500 per well per year was irrelevant.

Although by Notice of Hearing dated July 19, 1979, the Board appointed September 25, 1979, for hearing the Higgs Application, that hearing was aborted and in lieu thereof, the Board heard argument relating to an application, contained in several "Answer and Notice of Intention to Intervene" filed by Mr. Giffen on behalf of numerous landowners in various storage areas in southwestern Ontario, to add such persons as respondents and to adjourn the hearing to January or February, 1980.

Before the Board could dispose of Mr. Giffen's application, he filed another application dated February 28, 1980, on behalf of the following landowners ("the Kimpe Applicants") who are all landowners in the Bentpath Pool:

Achiel Kimpe

Keith Anderson Turner and Florence Annie Helen Turner

Mary Turner Graham, Allen Turner, Neil Grant Turner and Anna Mae Webster (formerly Turner)

Donald Camerson Sanderson and Audrey Bernice Sanderson

Frank Mathew Pomajba and Geraldine Frances Pomajba

George Andrew Thompson and Ella Marie Thompson

Max McFadden, Doreen McFadden, Douglas McFadden and Lois Jean McFadden

Larry Gordon Richards and Mary Jo Richards

Jack Ralph Smit and Melva Jeannette Smit

The Corporation of the Township of Dawn

Fredrick E. Sole and Jean M. Sole

William L. Thomas and Evelyn M. Thomas

This application was assigned docket number E.B.O. 64(2). The relief requested was for a determination by the Board of fair, just and equitable compensation for the loss of oil and gas rights, gas storage rights and compensation for any damages necessarily resulting from the exercise of the authority given to Union by the Board under Board Order E.B.O. 64. The application set out the details of the compensation claimed and requested interest on the amounts awarded as provided in section 33 of The Judicature Act, R.S.O. 1970, c. 228 as amended.

A few days later another application was filed with the Board by Mr. Giffen which was substantially the same as the February 28 application but which, in addition,

included a claim for costs of the application from Union on a solicitor and client basis using the Supreme Court scale. To differentiate between the two applications, the later one was designated by the Board as the 'Corrected' Application.

Numerous demands for particulars and notices of motion were issued by both Union and the Kimpe Applicants and eventually on July 30, 1980, the Board issued an ex parte order respecting the Board's practices and procedures in this case, and in particular it consolidated the application brought on behalf of the Higgs family E.B.O. 64(1) with that brought by Mr. Giffen on behalf of the Kimpe Applicants in the Bentpath Pool E.B.O. 64(2) under docket number E.B.O. 64(1)&(2).

Union's answer to the Corrected Application was filed on August 14, 1980. Interrogatories, replies, refusal to reply to certain interrogatories, motions to require replies, a motion to state a case to the Divisional Court and scores of letters passing between the Applicants and Union followed upon Union's answer. It is not necessary to detail the claims and counter-claims, however, the Board again observes that many of the difficulties, particularly those between Union and the Kimpe Applicants could have been avoided or settled by the parties talking to one another rather than writing, by working in a spirit of co-operation instead of obstruction and by using some common sense.

In addition, on March 18, 1981, Mr. Giffen, having previously abandoned a motion brought for this purpose, filed a further application on behalf of the Kimpe Applicants wherein he requested that pursuant to section 31 of the Act (now section 30) the Board rescind or vary the Orders made by it in E.B.O. 46 (the Board's unitization order for Bentpath) and E.B.O. 64 (the Board's authorization to inject order). In addition, the Kimpe Applicants requested costs of the application on a solicitor and client basis.

This application was given docket number E.B.O.64 (1)&(2)-C and is hereafter referred to as "the Application to Rescind". Union's answer to this application was filed on July 13, 1981.

On June 24, 1981, Mr. Giffen filed on behalf of his clients an "Amendment to Application of February 28, 1980". In these Reasons for Decision this application is referred to as the "Kimpe Application". The amendments to the earlier application were significant. The Kimpe Applicants now chose to rely on the report prepared by Messrs. Havlena, Freidenberg and Ruitenbeek (subsequently filed as Exhibit 63 and referred to as the "Havlena Report") as the basis of their claim for compensation for storage rights and abandoned all other alternatives for calculating such compensation.

On July 13 Union filed an amended answer in response to the Kimpe Application in which, among other things, it

reiterated that the Kimpe Applicants' claims for compensation were exorbitant and calculated contrary to the Expropriations Act or, if that act was not applicable, to the common law rules of expropriation, and denied any alleged misrepresentation on its part.

On November 4, 1981, as previously noted, the Board issued an order whereby the applications under dockets E.B.O. 64 (1), E.B.O. 64(2) and E.B.O. 64(1)&(2)-C were consolidated under docket E.B.O. 64(1)&(2) and a date for the commencement of the hearing was set for December 1, 1981.

During the course of the hearing, Mr. Giffen, on January 4, 1982, filed a "Second Amendment to Application of February 28, 1980," in which he added, as a basis of valuation of storage rights compensation, the principles followed by the Board in E.B.R.O. 365 and the methodologies used by Union, Tecumseh, and The Consumers' Gas Company Ltd. for purposes of deciding whether or not to obtain gas storage rights from other companies. On March 16, Mr. Giffen filed a "Third Amendment to Application of February 28, 1980", in which he added clause (h) which reads "In accordance with the evidence adduced herein and the exhibits thereto." This finally concluded the pleadings between the Kimpe Applicants and Union.

The Hearing

In August 1981, prior to appointing a date for the hearing to commence, the Board invited the parties of record at that time to a meeting to discuss, among other matters, a mutually convenient commencement date and the site of the hearing. The Board offered to hold all or part of the hearing in London or Sarnia, but pointed out the logistic problems in doing so. By letter dated September 9, Mr. Giffen advised that his clients had agreed to the entire hearing being held in Toronto commencing December 1, 1981. As both the site and date had been discussed and accepted by those parties attending the August meeting, the Board issued a procedural Order dated November 4, 1981, wherein a hearing date of December 1 was set and the following persons were considered to be respondents in the consolidated application:

- Union
- Tecumseh
- the Township of Moore
- those represented by Mr. Tennyson
- those represented by Mr. Giffen who were not applicants
- the storage customers of Union, and
- those intervenors who had appeared in Union's rate case E.B.R.O. 380.

A Notice of Hearing bearing the same date was also issued confirming the commencement date of the hearing and providing that the following matters would be dealt with by the Board at the hearing:

- compensation payable under section 21 of the Act to the Higgs family and the Kimpe Applicants; and
- whether Board Orders E.B.O.46 and 64 should be rescinded or varied.

The hearing commenced on schedule and, pursuant to an agreement amongst counsel, the first part was limited to the issue of alleged misrepresentation to Messrs. Kimpe, McFadden, Pomajba, Richards, Thompson and Turner by representatives of Union in connection with the negotiations of Gas Storage Agreements, Gas Storage Lease Agreements and oil and gas leases.

This phase of the hearing lasted four days. The witnesses called by Mr. Giffen and appearing on their own behalf were:

Achiel Kimpe
Douglas McFadden
Max McFadden
Frank M. Pomajba
Larry G. Richards
G. Andrew Thompson
Florence A. H. Turner

The witnesses called by Union were:

Ross M. Day - Manager, Lands Department, Union

John W. Thompson - former employee Lands Department, Union, now retired.

At the conclusion of this phase, the hearing was adjourned to January 11, 1982. It continued thereafter with some interruptions to March 4, 1982. The second phase dealt primarily with the issue of compensation payable under section 21 of the Act.

The witnesses called on behalf of the Kimpe Applicants by Mr. Giffen were:

H. Jack Ruitenbeek, Applied Economics Research Associates*

Z. G. Havlena - President D. G. Havlena, Hydrocarbon Consultants Limited

W. Brent Friedenberg, President, Brent Friedenberg & Associates Limited and co-partners of Applied Economics Research Associates.

J. Andrew Domagalski, Attorney at law, State of Michigan, U.S.A.

Dalen Ferns, Policy Development Director, Ontario Federation of Agriculture

Philip W. Bowman, Partner, Price Waterhouse

*The evidence given by Mr. Ruitenbeek during the hearing was adopted by Messrs. Havlena and Friedenberg.

The witnesses called by Union were:

Ross M. Day - recalled

Gary D. Black, Manager, Gas Supply, Union

David W. Patterson, Manager of Engineering and Planning, Union

Henry B. Arndt, Vice President, Utility Accounting, Union

Arthur C. Newton, Manager, Geology, Union

Oliver B. Rayment, Senior Lands Agent, Union

Jack R. Elenbaas, Petroleum Engineer, Consultant

Robert L. Warwick, Real Estate Appraiser, Primesite Appraisal Service

W. J. Elliott, Real Estate Appraiser

The witnesses called by Board counsel were:

Robert Mason, Senior Partner, Central Ontario Appraisals

Gary T. Kylie, Appraiser, Central Ontario Appraisals

As noted earlier, no one appeared on behalf of the Higgs family. By letter to the Board dated January 22, 1982, Mr. R. A. Blackburn advised the Board that:

> "I am therefore content to withdraw his (Walter R. Higgs) pre-filed evidence in support of the application. I am not withdrawing the Higgs application and am relying on the evidence called by Mr. Giffen to support the Higgs application."

Subsequently, in response to a letter of Board counsel, Mr. Blackburn, in a letter dated March 30, 1982, advised that ". . . I am supporting and in fact relying on Mr. Giffen's argument in support of the Higgs application."

The taking of evidence concluded on March 4, 1982. Written argument was requested by the Board and final reply argument by Mr. Giffen was filed on May 14, 1982.

The Board received arguments on behalf of the following:

- the Kimpe Applicants
- Union
- Board staff
- Industrial Gas Users Association
- Gaz Metropolitain, inc.
- Payne Pool Landowners and Harold and Dorothy Williams

Essentially, the Higgs family and the Kimpe Applicants are concerned with the determination by the Board of two issues - how much money are they entitled to for their storage rights, and who is entitled to receive such amount. However, in addition to these two fundamental questions, numerous sub-issues were raised as well. Consequently, the hearing lasted for some twenty days during the course of which 110 exhibits were filed. There were in addition, over 250 interrogatories issued and answered. Further, with respect to the Application to Rescind Board Orders E.B.O. 46 and 64, Counsel for the Kimpe Applicants and for Union filed statements of fact and law in which each set forth the positions to be taken by them in argument.

A verbatim transcript of the proceedings extending over 2,000 pages was made and is available for public scrutiny. It is therefore not necessary to summarize the evidence or submissions in detail. The entire record was considered in deciding the issues.

Introduction

The Board does not believe that Union deliberately set out to create an atmosphere of confusion and misunderstanding in the minds of the landowners in the Bentpath Pool. Nevertheless, the evidence before the Board indicates that this atmosphere, however created, did exist throughout the period in question. A brief summary of events surrounding the leasing of drilling and storage rights in the Bentpath Pool is necessary for a better understanding of the situation. Exhibit 40, Item D15, prepared by Union, identified the landowners in the Pool, the type of leases they have given and the payments being made. The relevant parts of that exhibit are attached as Appendix "A".

It appears that the first lease taken in the designated area was a lease entered into between Union and Archibald Turner in May 1951. These lands are now owned by Mary Turner Graham, Allen Turner, Neil Grant Turner and Anna Mae Webster, and the lease is referred to as the "Graham Turner Lease". This was an oil and gas lease which included gas storage provisions. The next lease taken was an oil and gas lease with gas storage provisions, signed in 1956 between Union and the Andrew Thompsons. In 1963 Imperial Oil Enterprises Ltd. ("Imperial") moved into the area and signed some eight landowners to oil and gas leases, but with no provision for storage. These leases were with the Pomajbas, the

Deightons (now Kimpe), the McFaddens, the Atchisons (now Gall), Russell Patterson (now the Richards), the Soles, the Turners and the Sandersons.

Union re-entered the picture in 1969. Donald Cameron Sanderson and Audrey Bernice Sanderson and Casper Edwin Atchison and Albert Anslow Atchison (now Edith Vera Gall) signed oil and gas leases with gas storage provisions. The Jacques (now the Smits), the Higgs and the Pattersons (now the Thomases) signed oil and gas leases without gas storage rights. In April 1970 the Pattersons (now the Thomases) signed a Gas Storage Lease Agreement which leased the gas storage rights to Union.

Between April 27, 1970 and May 5, 1970 those landowners with Imperial leases signed Gas Storage Agreements with Union. Attached to the Gas Storage Agreement was a Gas Storage Lease Agreement and a Lease and Grant Agreement. The net result was that all landowners within the Bentpath pool area, with the exception of the Township of Dawn, have leased their rights for drilling and production of oil and gas, and all landowners with the exception of the Township of Dawn, the Higgs and the Smits have signed leases for their gas storage rights.

There are significant differences in terms and conditions among the various gas storage agreements. The Graham Turner Lease provided, among other things, that the term of the lease was for 20 years and was to

continue as long as production continued in "paying quantities" and so long as the lands were being "used for storage of gas", that a notice of determination of the storage area would be given in writing, and that Union would pay the lessors $100 per year per well situated on the property.

The Gas Storage Agreement signed with those landowners who had leased oil and gas rights to Imperial provided for a 10 year term with automatic renewal in perpetuity at Union's option upon payment of the storage rental ($5 per acre per year payable in advance on the anniversary date); a prohibition against the extension of the Imperial lease without prior notice to Union; the execution of a Lease and Grant in the form attached to the Gas Storage Agreement; and the execution of a Gas Storage Lease Agreement also attached to the main agreement. Both the Gas Storage Lease Agreement and the Lease and Grant were initialled by the Lessors. The Gas Storage Agreement also contained the provision that the lessors would not oppose any application brought by Union to have the lands designated for storage.

The Gas Storage Lease Agreement signed by the Pattersons (now the Thomases) provided for a term of ten years subject again to automatic renewal in perpetuity on the same terms and conditions on the part of Union; for payment of $1.00 per acre per year payable in advance on the anniversary date of the agreement; for no injection of gas into the Pool without ten days notice (the

injection notice) whereby Union would notify the lessors of the commencement date of injection and the amount of additional storage rental Union was prepared to pay; for arbitration before the Board if the lessor and Union could not agree on the rental payment following injection; for payment of $100 for each well per year on the property and for the payment of $5.00 per acre per year for storage rights after the date specified in the injection notice.

The Gas Storage Lease Agreements initialled by those who signed Gas Storage Agreements did not specify the annual amounts that would be paid before and after injection.

Donald Cameron Sanderson executed a Union Oil and Gas Lease Agreement and the Unit Operation Agreement which was later approved by the Board in Order E.B.O. 46. For immediate purposes the details of these two agreements are not necessary.

Shortly before the last storage agreement was signed, the first discovery well was drilled on the McFadden property and some six months later, on December 7, 1970, gas was first produced from the Bentpath Pool. It is not clear when Imperial assigned all its oil and gas leases to Union, but it appears that it was during July 1972.

The next event of importance which is alleged by Union to affect the gas storage rights of the landowners in the Bentpath Pool is the Board's unitization order

E.B.O. 46 which was issued pursuant to section 24 (c) of the Act on March 6, 1972. The Board will deal with this Order and Board Order E.B.O. 64 in greater detail later in these Reasons for Decision. However, it is important to note that, among other things, the interests of the landowners in the Pool were joined and regulated by the Board for the purpose of drilling and operating wells and the carrying out of various matters, more particularly provided for in the Unit Operation Agreement, as if they and each of them had agreed to terms and conditions set forth in that agreement and that such joining and regulation be in accordance with the terms and conditions in the Unit Operation Agreement.

The Board's Order stated that it was to take effect only upon revocation of Ontario Regulation 396/70. Attached to the Order was the Unit Operation Agreement. The section which Union claims amended the Gas Storage Agreements is paragraph 4 which is reproduced in full below.

"4. Notwithstanding anything to the contrary expressed or implied in the said lease:

> (a) It is understood and agreed that in respect of each calendar year hereafter the Lessee shall pay or tender to the Lessor in lieu of all payments under the said lease:
>
> > (1) that proportion of the following royalties which the Lessor's acreage from time to time in the participating section of the unit area bears to the total acreage at such respective times in the participating section of the unit area:

(i) Two cents ($.02) per MCF for all gas produced, saved and marketed by the Lessee from the participating section of the unit area as measured by the Lessee;

(ii) Twelve and one-half per cent (12 1/2%) of the current market value at the point of measurement of crude oil produced, saved and marketed by the Lessee from the participating section of the unit area;

which royalties shall be paid or tendered to the Lessor monthly not later than the last day of the month following the month during which production is taken; provided that if the total of such royalties paid or tendered to the Lessor during any calendar year hereafter is less than an amount which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground gas storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands which during such year has been included in the participating section of the unit area, the Lessee shall, not later than the thirty-first day of January next following, pay or tender to the Lessor and the Lessor shall accept in respect of such calendar year an amount sufficient to bring the total amount payable to the Lessor under this sub-clause (a) (1) during such calendar year, up to the said total sum of Seven Dollars ($7.00) per acre;

(2) an amount for each and every acre of the said lands which during such calendar year has been retained by the Lessee under the said lease and/or this Agreement and which has not been included in the participating section of the unit area during such year, which taken along with the amount per acre per annum of any payment the Lessor also received during such calendar year from any source for underground storage rights in the said lands will total the sum of Seven Dollars ($7.00) for each and every acre of the said lands not included in the participating section of the unit area during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

(3) the sum of Five Dollars ($5.00) for each and every acre of the Lessor's lands which during such calendar year has been retained by the Lessee under the said Lease and which has not been included in the said lands during such year, which sum shall be paid or tendered to the Lessor not later than the thirty-first day of January next following;

and as long as the payments in this sub-clause (a) provided are made or tendered, the leased substances shall be deemed to be produced from, and operations for the recovery of same shall be deemed to be conducted by the Lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the Lessor's lands retained by the Lessee under the said lease and/or this Agreement.

Provided further that any royalties or rentals paid in advance under the said Lease in respect of any period within the effective term of this Agreement and which under the provisions of this sub-clause (a) would not have been required to be paid, shall be deducted from the payments aforesaid.

And provided further that in the calendar year in which this Agreement becomes effective the minimum payments under this sub-clause (a) shall be that proportion of the aforesaid minimum payments which the unexpired term of the said calendar year bears to the full calendar year.

(b) This Agreement shall be deemed to become effective on the first day of December, A.D. 1970."

According to Union this section superseded any agreement relating to payment for storage rights and thereafter Union paid to the landowners $7.00 per acre per year in arrears, claiming this included payment under gas storage agreements, and made necessary adjustments retroactive to December 1, 1970.

Production of gas from the Bentpath Pool ceased in August 1972 with estimated recoverable reserves remaining in the Pool of 466,216 Mcf.

In August 1974 the Board issued its Order E.B.O. 64 which allowed Union to inject and store gas in the Bentpath Pool. In June of that year Union offered Gas Storage Lease Agreements to those landowners holding its Gas Storage Agreements but the payment offered was $7.00 per acre per year, the same amount Union had paid from the effective date in the Board's Order E.B.O. 46. All the landowners refused to sign the new agreements and although negotiations continued thereafter for some period of time, no new agreements were signed.

To add to the confusion caused by the proliferation of different types of agreements and the changes in method and amount of payment, Union sent injection notices to the Kimpes, the McFaddens, the Pomajbas, the Richards and the Turners in February 1975. Those notices included offers to purchase the residual gas at 2 cents per Mcf, increase the acreage rental for storage to $12.36 per acre per year and pay $100 per year per well to those with wells on their property. The offers were not accepted by any of the landowners and were withdrawn in 1978. The Thomases, who should have received notice under the terms of the Gas Storage Lease Agreement before injection of gas could begin, did not receive the injection notice until February 27, 1975. An amended notice was sent to them in January 1978.

Notices of Determination, required under certain of Union's combined oil, gas and storage leases, should have been issued in 1974 at the time the Pool was being

designated for storage, but these were not sent until December 28, 1977. No well payments were made to these landowners for the intervening years even though the pool was being used for storage. Subsequent to December 28, 1977, well payments were made to these landowners and, in addition, were gratuitously made to other landowners whose agreements contained no provision for well payments.

All in all it must be said that Union's rather slap-dash dealings with the owners in the Bentpath Pool have neither been conducive to good public relations nor in keeping with sound business practice.

PART II

Applicants With Standing Before The Board

Jurisdiction of the Board

Section 13, subsection 1 of the Act provides that:

> "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact."

Section 21, subsection 2 of the Act reads as follows:

> "Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),
>
> (a) shall make to the owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
>
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order."

It was common ground amongst the parties that three of the Applicants, namely the Higgs, the Smits, or their predecessors on title, and the Township of Dawn have never executed agreements purporting to lease or assign or grant storage rights to Union. Kimpe, the McFaddens, the Pomajbas, the Richards, the Thompsons and the Turners have executed documents, which Union claimed have the effect of vesting storage rights in Union, and which Mr. Giffen categorized as "pieces of paper".

It was Union's position that those Applicants who have signed agreements with Union are bound by them, and that the Board lacks jurisdiction to look behind the agreements to determine their validity or enforcability.

Mr. Giffen, on the other hand, argued that the Board does have the jurisdiction to determine the validity of the contracts and in fact must do so before the Board can exercise its jurisdiction to determine fair, just and equitable compensation.

Board counsel supported Mr. Giffen's position.

In support of its contention, Union cited Board decision E.B.O. 57, dated July 1973, wherein the Board declined to exercise jurisdiction to declare certain contracts invalid. In that decision the Board said "the Board considers that if there is doubt as to the validity of the agreements, the proper place for the parties to obtain redress is in the courts." The Board agrees with Board counsel that E.B.O. 57 did not affect those customers with agreements. It also notes that that decision was delivered in 1973, well before the recent pronouncements by the Supreme Court of Canada on the jurisdiction of provincially appointed tribunals, which are referred to later herein.

Union also referred the Board to various exchanges between Mr. Kimpe and the then presiding member during the Bentpath designation hearing, E.B.O. 64, in Sarnia,

and again pointed out that the Board declined jurisdiction to review the methods used by Union in obtaining the Gas Storage Agreement with Mr. Kimpe.

The Board notes that Union attempted to distinguish the case of Re: Wellington v. Imperial Oil Limited [1970] 1 O.R. 177 on the basis that the Court had in issue before it compensation, not the validity of the contract. A similar distinction can be made with respect to the Bentpath designation hearing since that application was brought under section 21, subsection 1 of the Act, and Mr. Kimpe's agreement or contract was not an issue in any way in those deliberations.

Union also claimed that the Board lacks jurisdiction in this matter on constitutional grounds. Union maintained that the Board's jurisdiction to declare written agreements relating to interests in land invalid or unenforcable would be ultra vires on the ground that such jurisdiction has been exercisable solely by judges of superior, district or county courts since 1867. Union agreed that the Provincial Legislature may confer on a provincially appointed tribunal the right to decide incidental questions of law within that tribunal's jurisdiction. Union stated however that the Provincial Legislature cannot confer on a provincially appointed tribunal a power vested in superior or county courts to determine the validity of an agreement when the validity or otherwise of such agreement is a condition

precedent to the jurisdiction of such tribunal. In support of this submission, Union cited the Reference re: The Residential Tenancies Act, (1980) 26 O.R. (2d) 609, affirmed by the Supreme Court of Canada (1981) 37 N.R. 158 ("The Residential Tenancies case").

The same Supreme Court decision was cited by Board counsel to support an opposite view, that the Board does have jurisdiction, in the particular circumstances, to determine whether the agreements are valid.

Mr. Giffen's submission in relation to this issue was based on the statutory powers contained in the Act and several decisions of the Ontario Courts, including the Wellington case, which generally have held that the Board has been invested with broad general powers relating to matters specifically assigned to it by the Legislature.

The Wellington case was decided in 1969 and dealt with the Board's powers to interpret an agreement for purposes of section 21, of The Ontario Energy Board Act, 1964, which was the predecessor of section 21 (1) of the Act. In that decision, Pennell, J. said at Page 183:

> "It is to be observed that the Legislature imposed upon a board of arbitration, in the event of a dispute, the duty of deciding the amount of compensation. It may well be that in the discharge of its duty, the board of arbitration may become involved in a matter of law as well as a matter of fact. In such cases it seems to me, having regard to s. 21, the board of arbitration will have to ascertain the law and also ascertain the facts. I do not say that a board of arbitration has jurisdiction to

> determine an abstract point of law. But it seems to me that in many cases where a dispute arises as to the amount of compensation, the first thing the board of arbitration has to do is to enquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such enquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied."

Since that time, the Courts have taken an even more liberal view of a provincial tribunal's power to exercise a jurisdiction of the superior court.

Dickson, J. in The Residential Tenancies case reviews the liberalization process and concluded that:

> "I do not think it can be doubted that the courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. In general terms, it may be said that it is now open to the provinces to invest administrative bodies with "judicial functions" as part of a broader policy scheme."

The Court then formulated a three-step test to be applied in determining whether powers conferred on a tribunal by a Provincial Legislature constituted an invasion of the federal power to appoint judges under s. 96 of the B.N.A. Act. In this regard the Court had the following to say:

> "The jurisprudence since John East leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. This temporary segregation, or isolation, of the

impugned power is not for the purpose of turning back the clock and restoring Toronto v. York, as the governing authority, an approached deplored in Mississauga. It is rather the first step in a three step process.

"If the historical enquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter. ...If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the enquiry.

"Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a 'judicial' function? In addressing the issue it is important to keep in mind the further statement by Rand, J., in Dupont v. Inglis that '...it is the subject matter rather than the apparatus of adjudication that is determinative'. Thus the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.

"...If, after examining the institutional context, it becomes apparent that the power is not being exercised as a 'judicial power,' then the enquiry need go no further, for the power within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase - 'it is not the detached jurisdiction or power alone that

> is to be considered but rather its setting in the institutional arrangement in which it appears' - is the central core of the judgement in Tomko. It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in Tomko. What must be considered is the 'context' in which this power is exercised. ...It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal...or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature. ...In such a situation the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (Farrah) so that the tribunal can be said to be operating 'like a s. 96 court'.

The Court then reviewed the functions of the Residential Tenancies Commission in detail. The Court noted that the primary purpose and effect of the 1979 act was to transfer jurisdiction over a large and important body of law affecting landlords and tenants from the s. 96 courts, where it had been administered since Confederation, to a provincially appointed tribunal. The Court concluded that the primary role of the Commission was not to administer policy or to carry out administrative functions, but was to adjudicate. The Court stated that:

> "In the instant case the impugned powers are the nuclear core around which other powers and functions are collected...the whole of a s. 96 court's jurisdiction in a certain area, however limited, has been transferred to provincially appointed officials."

The Court therefore declared that in the particular circumstances the statutory provision conferring superior court powers upon a provincial tribunal was ultra vires and therefore invalid.

In the instant case the Board is being asked by a number of Applicants to determine fair, just and equitable compensation under section 21, subsections 2 and 3 of the Act. Before the Board can make such determination, it must ascertain what the subsisting rights of the parties are and in order to do this, it must ascertain if there are valid agreements in effect. If the agreements are valid the Board has no jurisdiction to determine compensation in respect of these Applicants. In short, the issue is: does the Board have jurisdiction to determine the validity of a written contract, a power usually reposing in a s. 96 court.

The Board's powers were reviewed at some length by the Divisional Court in Union Gas Limited v. Township of Dawn 15 O.R. (2d) 722. The judgment of the Court was delivered by Keith, J. At page 731, he states:

> "In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under exclusive jurisdiction of the Ontario Energy Board..."

In the Board's view it cannot be said, as was said in The Residential Tenancies case that:

> "...the impugned powers are the nuclear core around which other powers and functions are collected".

The Board also finds comfort in words of Pennell, J. in Wellington already referred to.

In the Board's opinion the exercise of the power to determine the validity of a contract for purposes of section 21, subsection 2 and 3 of the Act, is a power which "is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure." According to The Residential Tenancies case only if the impugned power forms a dominant aspect of the function of the tribunal is the conferral of such power ultra vires.

Based on the decisions in the Wellington case and The Residential Tenancies case, the Board concludes that it does have the power, as part of its broader administrative function, to determine the validity of contracts for purposes of making a determination under section 21, subsections 2 and 3 of the Act.

Effect of Section 22 of the Act

Mr. Giffen argued that any agreement relating to gas storage rights in the Bentpath Pool that was signed after January 1, 1965, is invalid because it had not received Board approval under section 22, subsection 2, of the Act.

At the time the Gas Storage Agreements were signed in 1970, section 22(2) read as follows:

> "No storage company shall on or after the first day of January 1965, enter into any agreement or renew any agreement with a transmitter or distributor with respect to the storage of gas unless,
>
> (a) the parties to the agreement or renewal;
>
> (b) the period for which the agreement or renewal is to be in operation; and
>
> (c) the storage that is subject to the agreement or renewal,
>
> have first been approved by the Board with or without a hearing."

In 1973 this subsection was amended by section 7 of The Ontario Energy Board Amendment Act, 1973. The amendment struck out the words "a transmitter or distributor" and inserted in lieu thereof "any person".

The Board is of the opinion that section 22, subsection 2 is not applicable to the issues before it. The agreements before the Board deal with property rights in gas storage facilities and not with the matter of storage of gas for others which is the subject matter of subsection 2 of section 22.

The Plea of Non est factum

Exhibit 34 in these proceedings contains the individual pre-filed evidence of Messrs. Kimpe, McFadden, Pomajba, Richards, Turner and Thompson. The pre-filed testimony was supplemented by evidence given at the hearing by each of these Applicants with the exception of Mr. Turner. In the case of the Turners, Mrs. Turner adopted the evidence of her husband and gave testimony in his place. (The Board had been informed that Mr. Turner was too ill to testify and although Mr. Giffen undertook to provide a medical certificate to that effect, none was produced during the proceedings.)

Generally, the pattern of the pre-filed evidence was that the landowners had not known that they were executing a gas storage lease and that they had relied upon the representations of Mr. J. W. Thompson of Union as to the nature of the documents.

Mr. Giffen entered a plea of non est factum on their behalf and in addition alleged misrepresentation and unconscionability on the part of Mr. Thompson and Union in their dealings with these Applicants.

It appears that at the present time the law in Ontario is as set out in the decision of the Supreme Court of Canada in Prudential Trust Co. v. Cugnet et al (1956), S.C.R. 915; 5 D.L.R. (2d) 1. This is the conclusion reached by the Ontario Courts, albeit somewhat

reluctantly in both Horvath v. Young (1980), 15 R.P.R. 266, and Marvco Colour Research Limited v. Harris et al (1980), 107 D.L.R. (3d) 632.

The unrefuted evidence in the Cugnet case was that a Mr. Hunter called upon Edward Cugnet at his home and told him that he wanted an option in respect of certain mineral rights and offered to pay Mr. Cugnet $32 on each quarter section for an option to take a petroleum and natural gas lease, such lease to take effect upon the expiration of the leases previously granted to other companies, and a further $32 yearly rental for each quarter section when the option was exercised and the petroleum and natural gas lease granted. After apparently a short conversation Mr. Cugnet signed a document entitled "assignment" wherein he transferred an undivided one-half interest in all petroleum, natural gas and related hydrocarbons in and under his lands, subject to a petroleum and natural gas lease covering the said lands, and agreed to deliver a registerable transfer of such interest. He also granted an exclusive option to acquire a petroleum and natural gas lease covering the said lands for a term of 99 years and at the same time executed a transfer in favour of Prudential of an undivided one-half interest in all mineral rights, excluding coal.

In the Cugnet case, Nolan, J. determined that the principle contained in Carlisle & Cumberland Banking v. Bragg [1911] 1 K.B. 489 should be applied rather than the

one contained in the case of Howatson v. Webb [1908] 1 Ch. 1. The principle in the Carlisle case is stated in the judgment of Buckley, L.J. as follows:

> "The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying "this is a conveyance of your property," or "this is your lease," and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially mislead as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question."

The Carlisle case has been overruled by the House of Lords in Saunders v. Anglia Building Society [1971] A.C. 1004. Nevertheless both the Horvath case and the Marvco case have held that the Carlisle case continues to apply. The question before the Board therefore is, did the Applicant know the nature and character of the document which he signed, that is, did he know he was leasing his gas storage rights and was that his intention.

The document which each party executed consisted first of a seven page document entitled in bold type "Gas Storage Agreement" to which was attached an eight page

document entitled "Lease and Grant" and another eight page document entitled "Gas Storage Lease Agreement." The title of each of the attached documents is in bold type and with the possible exception of Douglas McFadden and Mrs. Turner the first page of each was initialled by the Applicant, and his wife when necessary. The two attached documents are referred to in clauses 3 and 4 of the Gas Storage Agreement.

It should be noted that the first page of the Gas Storage Agreement had been completed by Union prior to presentation in that the names of the lessors had been typed in as well as the description of the properties, specific reference to the underlying Imperial oil and gas lease affecting the property and the amount of consideration paid. Page 2 of the said agreement also had typed in the annual rental rate. The Lease and Grant and the Gas Storage Lease Agreement were incomplete as no names or property descriptions had been inserted.

The Gas Storage Agreement contains 14 clauses in all. The first clause which appears in part on page 1 reads as follows:

> "1. Subject to the third party lease,
>
> (a) the Lessor does hereby demise and lease unto the Lessee, its successors and assigns, all strata, formations and horizons in and under the surface of the said lands together with the exclusive rights to bring gas from any source obtained into, to introduce, to inject and to store such gas at will in all or any part or parts of such strata, formations

and horizons and to keep or remove at will all or any part of such gas by pumping or otherwise through any well owned by the Lessee now existing or hereafter drilled in the said lands or in lands adjoining the said lands or in the vicinity thereof and with the exclusive right to use such strata, formations and horizons for the protection of gas stored in the said lands and/or within a gas storage area designated by law of which the said lands are part,

(b) the Lessor also grants and confirms unto the Lessee the right from time to time and at all times to enter upon the said lands to drill wells, to rework, operate or abandon any and all wells hereafter drilled by the Lessee in the said lands, to lay down, construct, operate, maintain, inspect, remove, replace, reconstruct, keep and use pipes, pipelines, well-heads, tanks, stations, structures and equipment necessary or incidental to the operations of the Lessee under this Agreement and including equipment necessary for the cathodic protection of the Lessee's pipelines, wells or well-head equipment at any time hereafter located on or in the said lands, together with the right of entry upon and of using and occupying so much of the surface of the said lands as may be necessary or convenient to carry on such operations and together with the right to fence in any portion of the surface of the said lands so used by the Lessee."

Clause 2 provides that the term of the agreement is for ten years subject to further automatic renewal for a further ten years on the same terms and conditions including the right to further renewal.

Clause 6 provides that the Lessors will not oppose any designation of the property as a storage area. Clause 7 provides that in the event that a Lease and Grant and a Gas Storage Lease Agreement are not entered into by the parties, the Gas Storage Agreement continues to apply at the same rental.

The Gas Storage Lease Agreement contains a number of provisions significantly different from those in the Gas Storage Agreement. Of particular importance are clauses 3, 4 and 6(b) which are set out below:

> "3. The Lessee shall not inject gas for storage into the said lands under this Agreement or use the said lands for the protection of gas stored within a gas storage area designated by law of which the said lands are part, until it has given the Lessor at least ten (10) days advance written notice ("the injection notice") specifying,
>
> (a) the date upon which the said lands will first be used for the injection, storage and removal of gas or the protection of gas stored within a gas storage area designated by law of which the said lands are part;
>
> (b) the amount of additional acreage rental per acre per annum the Lessee is willing to pay to the Lessor in respect of the use or uses mentioned in paragraph (a);
>
> (c) the total surface acreage of the designated gas storage area of which the said lands are part, the total surface acreage of the participating area of the said designated gas storage area ("the participating acreage", meaning the surface acreage of the estimated productive area of the gas storage pool contained within the said designated gas storage area), "the Lessor's participating acreage", meaning the number of surface acres of the said lands contained in the participating acreage of the Pool, and, the total volume of residual gas above a reservoir pressure of 50 p.s.i.a. bottom-hole on the date mentioned in paragraph (a) in the storage pool contained within the said designated gas storage area, and,
>
> (d) the amount of an offer to purchase from the Lessor ("the purchase price") the Lessor's royalty interest in any residual gas in the said lands on the date

mentioned in paragraph (a) above a reservoir pressure of 50 p.s.i.a. bottom-hole at a price of 2 cents per m.c.f. such interest to be that percentage of the total volume of residual gas above the reservoir pressure aforesaid on the date above mentioned in the storage pool contained within the designated gas storage area of which the said lands are part, which the Lessor's participating acreage on such date bears to the total participating acreage in such designated gas storage area, taken on a surface acreage basis.

4. Upon receipt of the injection notice, the Lessor shall within thirty (30) days advise the Lessee in writing that he disputes any or all of the additional acreage rental, the participating acreage, the Lessor's participating acreage or the total volume of residual gas specified in the injection notice and in default of such notice of dispute, the Lessor shall be deemed to have agreed to such matters as specified in the injection notice and the same shall become final and binding upon the Lessor and the Lessee. In the event that the Lessor gives such notice of dispute, then any of the items of the additional acreage rental, the participating acreage, the Lessor's participating acreage or the total volume of residual gas so disputed shall be determined by arbitration in the manner provided for in The Ontario Energy Board Act, 1964 and the Regulations thereunder or under any Act or Regulations in amendment or substitution therefor, with right of appeal as therein provided for.

6. From and after the date specified in the injection notice,

(b) the Lessee shall pay to the Lessor a well payment of One Hundred Dollars ($100.00) per annum per well for each well drilled and retained in the said lands for the injection and withdrawal of gas, for so long as such well is so retained; with respect to any such well in existence on the date specified in the injection notice, the first well payment shall be due and payable within thirty (30) days of such date but the Lessee shall be given credit for the unearned portion of any

> well payment with respect to such well under the said lease and thereafter, each succeeding annual payment shall be due and payable annually in advance on the anniversary of the date specified in the injection notice; with respect to any such well completed after the date specified in the injection notice, the first well payment shall be due and payable on the first anniversary of the date specified in the injection notice following the date of completion of such well and succeeding payments shall be due and payable annually in advance on the anniversary dates thereof;"

The provisions of the Lease and Grant would give Union the usual oil and gas drilling rights for a term of ten years and so long thereafter as "these substances or any of them are produced or deemed produced from the said land, subject to the other provisions herein contained".

It is evident from the foregoing that the documents clearly are neither simple nor likely to be immediately and totally comprehensible to the average person.

The Board is faced with the unenviable task of determining whose evidence is to be given greater weight, the landowners or Mr. J. W. Thompson of Union since the evidence is often contradictory. The difficulty is compounded because the evidence relates to events which took place twelve years ago, and in one case over twenty-six years ago. Subsequent events may to some degree have coloured the witnesses' recollections. Mr. Thompson of Union perhaps was most candid in an exchange with Mr. Giffen at page 440 of the transcript:

> "Q. (by Mr. Giffen)... you have no recollection of the specific questions asked by Mr. Kimpe, nor the specific answers given by you?

A. No, sir, not after almost twelve years, I don't, on anything.

Q. On anything?

A. Including Mr. Kimpe."

and with Mr. Woollcombe at page 499 in the following exchange:

"Q. With hindsight, would you agree with me that looking at these three documents might create confusion in the minds of even a well-educated person?

A. I would certainly go along with that, sir, unless you're familiar with them.

Q. And you were familiar with them?

A. Absolutely, sir.

Q. You attempted to make the landowners familiar with them?

A. That I did, sir.

Q. And there may still have been some confusion on their part?

A. Absolutely, sir; still is, I think on some."

It is necessary to review the evidence of each individual Applicant, for purposes of ascertaining whether or not the plea of non est factum is available to him.

We will begin with Mr. Kimpe.

Mr. Kimpe came to Canada in 1958 from Belgium. In August 1968, he purchased lands situate in the Bentpath Pool which were already subject to an oil and gas lease in favor of Imperial. The Gas Storage Agreement with Union was signed by him on or about the first day of May 1970. At that time Mr. Kimpe said his understanding of

the English language was "limited" and that he was "confused by a number of words." Mr. Kimpe's evidence is contained in Exhibit 34, Tab 1, and transcript pages 28 through 112. The cross-examination of Mr. Kimpe runs from pages 49 to 112. Mr. Kimpe's answers to questions 13, 14, 15, 16 and 17, under Tab 1, contain the gist of his recollection of the discussion that took place between himself and Mr. Thompson at the time the Gas Storage Agreement was signed. In essence, Mr. Kimpe stated that he did not read the document, did not understand it because of his limited English, did not consult anybody about it, and he relied "totally on the representations of Mr. Thompson in connection therewith and in connection with its contents." According to Mr. Kimpe, Mr. Thompson told him that the Gas Storage Agreement would "bring up-to-date" or replace the existing Imperial lease; that he and his neighbours would all have "the same thing"; that it was not a Gas Storage Agreement and that in the event gas was found, another document would have to be signed. The discussion between Mr. Thompson and Mr. Kimpe apparently lasted about one hour with Mrs. Kimpe present most of the time. (Mrs. Kimpe was not called upon to give evidence.)

At page 8 of Exhibit 43, Mr. Thompson stated:

> "Mr. Kimpe did not read the entire Agreement with its attachments, page by page. However, I explained to him the substance of the Agreement and its attachments, and we discussed the entire document and its effect. I answered any

> of his questions and explained any matter which he questioned. He did not ask to read over the entire agreement, nor did he ask me to read it over to him. He seemed quite satisfied."

Notwithstanding that he had received a letter from Union dated May 12, 1970, which stated in the first paragraph, "Thank you for granting this company a Gas Storage Agreement over the above-mentioned property.", Mr. Kimpe said that he was not aware that he had signed a lease for gas storage until some time in the fall of 1970 or early 1971, after a discussion with his neighbour, the late Mr. Jacques. Following this conversation with Mr. Jacques, Mr. Kimpe attended at the registry office in Sarnia, checked the leases of some of his neighbours including Mr. Jacques' against his own and found that they were not the same. Mr. Jacques' property was subject to an oil and gas lease only.

The Board agrees with its counsel that in view of the time lapse the more reliable evidence would be any written evidence.

Exhibit 46 consists of three pages of hand-written notes prepared by Mr. Kimpe, apparently as an aide memoire for a meeting with his solicitor, Mr. Steele, which took place about April 27, 1972. These notes were based on notes prepared by Mr. Kimpe for himself some time after his conversation with Mr. Jacques, either in late 1970 or early 1971. The latter consists of two pages that were entered as Exhibit 47. Exhibit 47 states in part that "Thomas [sic]

mentioned that this was not a storage agreement and when gas was founded I would have to sign a paper where I would receive $20 an acre." Mr. Robinette took the position that these two exhibits were not admissible because they were not made concurrently with or within a reasonable time of the events being described. In weighing this evidence, the Board has taken Mr. Robinette's objection into account. Under Tab 8 of Exhibit 34, there is a letter of objection to the application in E.B.O. 64, dated June 3, 1974, addressed to the Board. Mr. Kimpe in paragraphs 7, 8, 9 and 10 asked the Board to "check into the manner in which the leases have been signed" and stated that the language is confusing, the term is too long, and the price is too low. During the hearing of that application, Mr. Kimpe told the Board that "I am irritated about the way Union Gas has been approaching us about signing leases." It should be noted that prior to that hearing Union had attempted to have the landowners sign Gas Storage Lease Agreements at the same rental as provided in the Gas Storage Agreement. Union was unsuccessful in this regard. The Board is not sure whether Mr. Kimpe's reference to the manner of signing related to the Gas Storage Agreement or the Gas Storage Lease Agreement or both. In 1976, Mr. Kimpe wrote to the Ombudsman. (Exhibit 34, Tab 14.) He stated "On the 2 May, 1976, [sic] under the false pretense and threats of property

expropriation, I signed a lease with Union Gas Limited..." and later in the same letter "I know I have been taken by Union Gas Company...". The Ombudsman declined to act because of his limited statutory jurisdiction in these matters.

After an evaluation of the evidence, the Board has no doubt that Union believed it had obtained a valid and binding Gas Storage Agreement from Mr. Kimpe. Certainly its letter of May 12, 1970, and the comments on the vouchers accompanying the cheques indicated this. However, Mr. Kimpe is adamant that at the time he signed the Gas Storage Agreement he believed it to be a drilling lease only. Certainly in the period since signing he has made repeated attempts to correct the situation through representation to this Board and to others. Mr. Thompson's recollection of the discussion with Mr. Kimpe in May of 1970, is unclear. In some respects he confirms Mr. Kimpe's testimony, and in others contradicts it. The Board accepts that Mr. Thompson tried to help Mr. Kimpe by explaining the Gas Storage Agreement and the attachments. Nevertheless, as indicated earlier herein the Board considers that the Union agreements are not easily understood and, on the evidence before it, has concluded that Mr. Kimpe did not understand the nature and character of the document that he signed, that he believed it would be replaced by the Gas Storage Lease Agreement when storage was needed by Union, that he would

have the opportunity of negotiating a higher rental and that he did not intend to grant the gas storage rights to his property to Union when he executed the Gas Storage Agreement. Accordingly the plea of non est factum must succeed with this Applicant. The Board has also considered whether laches or estoppel would apply in these circumstances and concludes that they do not. The Board having reached this conclusion does not need to make a finding as to misrepresentation or unconscionability with respect to Mr. Kimpe.

The next Applicants to put forward a plea of non est factum are Douglas McFadden and Max McFadden, two brothers who jointly own property in the Bentpath Pool area. Their prefiled evidence is found in Exhibit 34, Tabs 20 and 21, and transcript pages 112 to 164. Douglas McFadden recalled signing the Gas Storage Agreement but did not remember initialling or seeing or discussing the Gas Storage Lease Agreement and the Lease and Grant. In his prefiled testimony he stated that Mr. Thompson of Union offered $5.00 an acre for the lease "which I understood to be for drilling and production".

Max McFadden had little recollection of the relevant facts including initialling the two documents attached to the Gas Storage Agreement but said that the initials M. M. "could be mine".

During examination Douglas McFadden recalled that Mr. Thompson discussed storage and that he, McFadden, said, "This is funny; you are asking me to sign the

storage lease [emphasis added] when you haven't even got gas." According to Mr. McFadden, Mr. Thompson replied that it was not really a Storage Agreement but a "working agreement". At page 134, in response to Mr. Robinette, Douglas McFadden admitted that gas storage had been discussed with Mr. Thompson and that he had probably been aware of the title Gas Storage Agreement. In response to a question of the Presiding Member of the Board:

> "Q. Did you not question each other: Do you understand what this is all about?
>
> A. Maybe I did. I don't really recall now. I trusted Mr. Thompson, and he said that it was about storage agreement and, as I said before, he said it was a working agreement, and he needed our signature ...".

The agreement according to Max McFadden was left with the McFaddens and discussed between themselves before they and their wives signed it.

Mr. Thompson discussed his meeting with the McFaddens in Exhibit 43. Although he later amended his testimony as to the place where the agreement was finally signed by the McFaddens and their wives, he maintained throughout his examination that he told the McFaddens that storage rights were the subject of the agreement.

Again, as with Mr. Kimpe, there is some conflicting evidence as to what took place.

The Board found Douglas McFadden to be a shrewd, if somewhat less than candid individual. He appears to be the dominant of the two brothers, and the Board believes that it would have been his decision which carried the

most weight. The Board concludes from his testimony that he knew that what Union wanted to lease was the gas storage rights on the property. Max McFadden was of little help to the Board as he readily admitted that he had little recollection of the events that transpired when the agreement was signed on or about April 29, 1970.

The Board concludes from the testimony that neither of the McFaddens, nor Mr. Thompson, had a clear or accurate recollection of what specifically was said when the agreement was brought to the McFaddens for signature, but in this instance the Board is satisfied that the McFaddens knew the nature and character of the document which they executed, that is, they knew they were leasing their gas storage rights and they intended to do so. Under these circumstances the plea of non est factum must fail. The Board does not find that there was any misrepresentation on the part of Mr. Thompson in the negotiations, indeed none was alleged. The Board also finds that the plea of unconscionability fails with respect to all the Kimpe Applicants for reasons detailed later herein. Accordingly the Board finds that the agreement between the McFaddens and Union is valid and binding, therefore these Applicants have no standing before the Board with respect to section 21, subsections 2 and 3 of the Act.

Mr. Pomajba, the next Applicant, was 31 years old with four years of high school and two years of agricultural school when he signed the Gas Storage

Agreement. His prefiled testimony is under Tab 22, Exhibit 34. He stated there that he thought that Union was getting no more than Imperial already had under its oil and gas lease with him, and that the offer of $5.00 was an improvement over the $1.00 being paid by Imperial at that time. Mr. Pomajba said he thought Imperial already had storage rights. Mr. Pomajba's written evidence is confusing. He stated at page 3 of his prefiled testimony "I felt, because of my loss at the hearing regarding the assignments that I had to now sign these agreements." The Board takes from this evidence that Mr. Pomajba was referring to the unitization hearing which did not take place until October 1971, some considerable time after the Gas Storage Agreement was signed.

Mr. Pomajba was obviously uncomfortable during his appearance before the Board; however, the Board considers his answers to be truthful to the best of his knowledge. During examination by his counsel, Mr. Pomajba became confused, partially, in the Board's view, because of the manner in which Mr. Giffen posed his questions. Mr. Pomajba admitted that Mr. Thompson told him that the Agreement was for storage rights. Although he repeated that he thought Imperial already had such rights under its agreement, this testimony was reversed in cross-examination by Mr. Woollcombe. Mr. Pomajba also stated that he had the document in his possession for a

couple of days in order that he and his father could look it over and, with the concurrence of his father, he signed it.

Again applying the principle in the Cugnet case the Board concludes, based on Mr. Pomajba's testimony that he knew the nature and character of the Gas Storage Agreement which he was signing. While he may have been confused as to the term and may have had some reservations as to the price, he knew that he was leasing his storage rights to Union and intended to do so. Therefore, the plea of non est factum fails, and the Pomajbas have no standing before the Board with respect to section 21, subsections 2 and 3 of the Act. The Board also finds that there was no misrepresentation on the part of Mr. Thompson in obtaining the Gas Storage Agreement such as to render it voidable.

Mr. Richards was 26 years old with four years of high school when he signed the Gas Storage Agreement in 1970. His prefiled testimony is found in Exhibit 34, Tab 23. It appears from this evidence that Mr. Richards relied upon Mr. Thompson's representation. He stated in examination-in-chief that it was his understanding from Mr. Thompson that "if gas was discovered and if they [Union] wanted land for storage later, we would negotiate it at a later date." It appears that Mr. Richards had the Gas Storage Agreement in his possession for a week before he signed it. He admitted reading it, and

discussing it with his wife, but he stated that he did not understand it or what gas storage was and that he was under the impression that it was a drilling lease.

Mr. Thompson denied that he told Mr. Richards that the Gas Storage Agreement was a drilling lease. He maintained that he told Mr. Richards that he, Mr. Thompson, was there to lease the storage rights on his farm, and that the document which was discussed was clearly a Gas Storage Agreement not an oil and gas production lease.

In this instance, as with Mr. Kimpe, there is a direct conflict of evidence between Mr. Richards and Mr. Thompson of Union. Unlike the case of Mr. Kimpe, there is no written evidence to indicate that Mr. Richards believed that he had been induced to sign an agreement under false pretences, nor that he did not know what he was signing; nor did he make any effort in the intervening years to redress any injustice which he now claims that he suffered. The Board does not disbelieve Mr. Richard's recollection of the events in 1970. It concludes from the evidence, however, that although Mr. Richards likely expected to sign a further agreement when the pool was used for storage, and although he may not have known precisely what gas storage was or how it worked at the time he signed the Gas Storage Agreement, he did know that he was leasing his gas storage rights to Union and that he intended to do so. Under these circumstances the plea of non est factum must fail and the

Board finds that the Gas Storage Agreement is not voidable on the grounds of misrepresentation. The Richards, therefore, have no standing before the Board with respect to section 21(2) and (3) of the Act.

As noted earlier Mrs. Turner adopted the prefiled evidence of her husband, Keith Turner, and she gave evidence at the hearing. In Exhibit 34, under Tab 28, Mr. Turner stated that Mr. Thompson had said in effect "we might as well sign these now, I'm here. If anything is wrong it can be straightened out later." He also said:

> "Mr. Thompson was very select in what he pointed out regarding this document. My counsel has informed me that these documents may be construed to go on forever. We were very shocked when we learned this. We never understood these documents, which Mr. Thompson must have known. We also did not realize that this document was for storage which Mr. Thompson did not point out to us. We think he took advantage of us."

At page 21 of Exhibit 43 Mr. Thompson responded to the above and stated:

> "This is definitely not correct. I well recall my meeting with Mr. Turner on that occasion. Mr. Turner was one of those persons who insisted on complete discussion. I clearly recall spending considerable time with him in discussing the details of the Gas Storage Agreement I was presenting to him and they were discussed in considerable detail. We spent considerable time doing so, and I certainly did not tell him to sign and we'd straighten out anything later. We had a detailed discussion."

Mr. Thompson went on to say that this discussion took place before the agreement was signed and that Mr. Turner seemed to quite understand what he was signing.

In addition to farming the land in the Bentpath Pool, Mr. Turner is currently employed as a stationary engineer. He has three years of high school. Mrs. Turner completed high school and has a year of business school.

Mrs. Turner admitted that she and her husband knew about "the whole idea of storage" and that they were aware at the time the Agreement was signed of "serious problems that had been encountered in other pools." She also admitted that the discussion with Mr. Thompson easily lasted a couple of hours. She insisted, however, that "we do not recall discussing storage with Mr. Thompson at all.".

When cross-examined by Mr. Robinette with respect to the Gas Storage Agreement, particularly with reference to the heading and the granting clause she insisted that she could not recall seeing either of them at the time the document was signed and finally said that she and her husband had read the Lease and Grant and "thought we were signing that." In response to the question by Mr. Robinette whether she thought there had been either an accidental or a fraudulent transposition of papers,

Mrs. Turner did not answer the question but again averred "we thought we were signing a lease and grant to drill on our property".

The Board has considerable difficulty with Mrs. Turner's evidence. Mrs. Turner is clearly an intelligent woman with some business experience. According to Mr. Thompson, Mr. Turner is a person who wants to know all the facts. Mrs. Turner confirmed this when she agreed with Mr. Woollcombe that her husband insists on a complete discussion before he signs anything. The Turners had themselves executed the Lease and Grant with Imperial in 1968; therefore, they knew their drilling rights had already been leased to that company. Since the Turners had heard that there had been problems with Union with respect to storage rights, one would expect that they would have been very careful in their dealings with Union. Under these circumstances the Board finds it impossible to believe that there was nothing said about storage during the two hours that Mr. Thompson was at the Turners' home. The Board also has difficulty in believing that neither Mr. nor Mrs. Turner saw the heading "Gas Storage Agreement" on the document they executed. Mr. Turner initialled the first page of the Lease and Grant, and the Gas Storage Lease Agreement, but both he and Mrs. Turner signed the Gas Storage Agreement. Mrs. Turner says that she and her husband would have had to have been "stupid" or "idiots"

to sign the Gas Storage Agreement. The Board certainly did not see either of these traits in Mrs. Turner during the hearing. No action was taken by the Turners subsequent to the execution, to right what they now allege to have been a wrong. Mr. Turner appeared before the Board at the designation hearing E.B.O. 64, and his primary concern at that time was the noise and odour from a nearby dehydrator. He made no mention of any misrepresentation with respect to the Gas Storage Agreement. The correspondence between the Turners and both Union and Imperial, found in Exhibit 38 does not show any allegation of misrepresentation as to the nature of the agreement although dissatisfaction with the level of compensation is expressed.

The Board, after carefully weighing the evidence of the Turners and Mr. Thompson, concludes that the evidence of Mr. Thompson is to be preferred. It finds the Turners were told that the Gas Storage Agreement would convey the gas storage rights to Union and they signed the Agreement knowing this to be the case. The Board finds that there was no misrepresentation and that the plea of non est factum is not supported by the evidence. Accordingly the Turners have no standing before the board with respect to section 21, subsections 2 and 3.

The last Applicant to rely on the plea of non est factum was Andrew Thompson. Andrew Thompson signed an agreement with Union in April 1956, (Exhibit 24, tab 4)

which granted Union oil and gas rights and storage rights for a term of 20 years and so long thereafter as any of the said substances are produced in paying quantities or the lands are used for underground storage of gas.

Andrew Thompson has been farming since he was 15 years old, and he has a public school education. He recalled in his prefiled testimony Exhibit 34, Tab 24, that Mr. Reaume of Union told him that the agreement was a petroleum and natural gas lease and that he relied solely on Mr. Reaume to explain the document to him.

In response to a question from the Board, Andrew Thompson agreed that while he did not understand all the words in the Agreement, he understood that storage rights were being granted to Union. He added that at that time he was in need of money. Under the circumstances the plea of non est factum fails. There was no misrepresentation alleged by Andrew Thompson with respect to the Union Agreement.

In the alternative, Andrew Thompson pleaded that the agreement dated April 24, 1956 had expired.

The term of the agreement is contained in the following clauses:

> "The rights hereby granted shall continue for a term of twenty years from the date hereof and so long thereafter as any of the said substances is or are produced in paying quantities from the said lands or any part of them and/or so long as the Lessee continues operations on the said lands or any of them and/or so long as the said lands, or any part thereof, are used for underground storage of gas as aforesaid.

> In order to provide for the storage of gas underground and for the purpose of protecting the said gas so stored the Lessee shall have the right at any time, and from time to time, to determine that any lands covered by grants or leases held by it shall be a storage area. Notice of such determination shall be given in writing to the owner for the time being of each parcel of land included in the said storage area. Should the lands above described at any time be included in any such storage area and notice be given as aforesaid then the rights and privileges granted by this Indenture, as same exist at the time of said notice, and subject to all covenants and conditions, including the amount then being paid as rental, at that time binding upon the Lessee, shall continue as long as gas is being stored in the designated area or for any part thereof."

Therefore the basic term of the Thompson lease would normally have expired April 24, 1976. According to Exhibit 36 (new) Group 1-38, final production ceased in the Bentpath Pool on August 16, 1972. First injection, though unauthorized, commenced July 31, 1974. Board authority to inject was granted on August 19, 1974 by Board Order E.B.O. 64.

Mr. Giffen argued that, regardless of the facts of the matter, Union did not designate the Bentpath Pool as a storage area until it sent out a Notice of Determination as required in the agreement. This notice was not sent to the Thompsons until December 28, 1977, and consequently the basic term had expired. Further, Mr. Giffen alleged that no payments on account of storage were ever made under the Thompsons' lease. He submitted that there is no storage agreement affecting the Thompsons' land, and that therefore the Andrew Thompsons have standing before the Board with respect to section 21(2) and (3) of the Act.

Union argued that Board Order E.B.O. 46 which was issued by the Board March 16, 1972 effective March 20, 1972 had a "fundamental effect" on the agreement because that Order provided through the Unit Operation Agreement that so long as payments under the latter agreement were made or tendered, the leased substances were deemed to be produced and the lease was deemed to remain in full force and effect. It was Union's position that all payments called for in E.B.O. 46 have been duly and properly made or tendered and have been accepted, therefore, the basic term of the original lease has been extended and continued.

The Board does not accept Mr. Giffen's argument that the effective date of designation of the storage area is that given by Union in its Notice of Determination. Union was clearly remiss in failing to inform the Thompsons that the pool was to be designated as a storage area, but it was Ontario Regulation 585/74 which designated the pool as a storage area on August 8, 1974, not Union's notice. At the date of expiry of the basic term, that is April 21, 1976, the lands in question were being used for storage and therefore under the provisions of the agreement of 1956, the term was extended and continued so long as the lands are used for storage. The Board therefore finds the agreement to be valid and binding and that the Andrew Thompsons have no standing before the Board with respect to section 21 (2) and (3) of the Act.

Expiry Dates of Other Leases

The Donald Cameron Sanderson lease with Union, in the same form as that signed by the Andrew Thompsons, is found at Tab 11, Exhibit 24. This agreement dated July 7, 1969 had a basic term of five years. It was amended by an Oil and Gas Grant Amending Agreement dated September 25, 1970, which essentially only amended the payments under the original agreement. The basic term of the agreement would have expired July 7, 1974. The arguments of Mr. Giffen and Union are the same with respect to Mr. Sanderson as they were with respect to the Thompsons. On the date that the basic term would have expired, there was no production from the Bentpath Pool nor had the area been designated or used for storage purposes. Board Order E.B.O. 46 incorporating the Unit Operation Agreement was issued on March 6, 1972. The Board agrees with Board counsel that paragraph 4 of the Unit Operation Agreement kept the Sanderson lease alive beyond the basic term provided in the original lease. Therefore the Sandersons cannot be considered to be Applicants before the Board for the purposes of section 21(2) and (3).

On May 18, 1951 Archibald Turner executed an Oil and Gas Grant with Union, again in the same form as that signed by Andrew Thompson. The primary term was for 20 years, and unless there was production in paying

quantities or storage the term would expire on May 18, 1971. The Graham Turners obtained their land subject to this agreement (the "Graham Turner Lease").

Exhibit 88 shows the production history of the Bentpath Pool. As indicated earlier, first production commenced December 7, 1970 and continued during the months of January, February, and March 1971. On April 1, 1971 the pool was apparently shut down for stabilization. There was no production from the pool between April and October 1971 inclusive. Production resumed for the months of November and December, ceased in January and February and resumed in March and continued to August 16, 1972. On the specific date of May 18, 1971 no gas was being produced from the pool.

Mr. Giffen argued that this lease expired on that date and that order E.B.O. 46 could not revive it. On the other hand Union submitted that since a producing gas well had been completed on the Graham Turner property in January 15, 1971, it would be appropriate to construe "gas produced" as equivalent to or meaning the same thing as "completion of a well capable of production in paying quantities". On this basis Union argued that the Graham Turner Lease was in fact a valid and subsisting lease on the effective date of the issuance of the Board E.B.O. 46 and was continued in full force and effect pursuant to the terms of that order.

Some background is necessary to place the events relating to the operation of the Bentpath Pool in perspective.

Union was prohibited by Ontario Regulation 396/70 from producing the pool without the consent of the Minister of Mines and Northern Affairs (Exhibit 27, Tab 33). By letter dated October 14, 1970 Union was authorized on behalf of that Ministry to produce gas from the pool providing that all the interests of the parties were joined not later than April 30, 1971. Union produced gas during the months of January, February and March 1971, as previously noted, with cumulative production of 3.078 Bcf. The April 30 date was extended by letter from the Ministry dated April 8, 1971 which was filed as Exhibit 24 in the E.B.O. 46 hearing. The letter reads in part as follows:

> "1. Production from the Bentpath pool commenced 7 December 1970 and was temporarily terminated 1 April 1971. Production from this pool will commence again on or about 1 November 1971.
>
> 2. This Department's instructions to you, dated 14 October 1970, include the condition that all the interests in the pool shall be joined for the purpose of producing the well or wells not later than 30 April 1971. In view of the difficulties which are being experienced in respect of complying with The Ontario Municipal Act, this date is being extended to 15 June 1971. If unitization of the pool has not been voluntarily agreed to by all parties concerned, the matter is to be referred to the Ontario Energy Board for compulsory unitization.

Why the period was extended to only June 15, 1971, when Union apparently had no intention of recommencing production until November 1, 1971 was not explained at that hearing.

Union did not apply to the Board for unitization until July 30, 1971. The matter was heard in Sarnia on October 28, 1971 and was resumed again on December 14, 1971. Reasons for Decision approving unitization were issued on February 16, 1972 followed by an Order dated March 6, 1972.

Meanwhile by letter dated November 9, 1971, the Minister again extended the time for production, this time to December 15, 1971. Apparently production resumed upon receipt of that letter and continued to December 15, 1971. No subsequent production took place until the Board Order was issued in March, 1972.

There were two periods, therefore, when Union had no authority to produce gas from the Bentpath Pool - the first June 15 to November 9, 1971, inclusive, and the second December 15, 1971 to March 6, 1972 inclusive. During those periods production did not take place. Between April 30 and June 15, 1971, Union could have produced gas from the pool, nevertheless it decided not to do so. When Mr. Newton was asked during E.B.O. 46 hearing for the reason for this, he replied as follows:

> "Under our contract we were negotiating with other interested parties, at that time we had in mind under that contract trying to establish production figures in the order of 3 BCF of gas. We had reached slightly over that 3 BCF

> by the end of March 31, 1971, and that was, having that in mind, we shut it in and we had fulfilled the obligations we had intended to execute at that time."

The situation therefore is that on May 18, 1971 Union could have produced gas from the pool in paying quantities, and it was in a position to do so until June 15, 1971. Thereafter, without Board Order or further Ministerial authorization, Union was prohibited from producing gas from that pool. The Board is not impressed with Union's ingenious argument and in the Board's view the hiatus following June 15 was sufficient to terminate the Graham Turner Lease. The Board agrees with its counsel that Board Order E.B.O. 46 could not revive a lease which had already expired and therefore the Graham Turners do not have a storage agreement with Union. The Graham Turners therefore have standing before the Board with respect to an application to determine fair, just and equitable compensation under section 21 (2) and (3) of the Act. In the circumstances of this agreement, the Board finds that neither estoppel nor laches applies.

Subject to the above findings the Board agrees that the Union oil and gas leases which contained storage provisions have been extended by Board Order E.B.O. 46 so long as payments provided in the Unit Operation Agreement were made.

The Plea of Unconscionability

Mr. Giffen's argument on unconscionability was short and his pleadings were silent on this issue. Nevertheless the Board takes from his argument and the cases cited by him that the Gas Storage Agreements were unconscionable because the rental payment offer was unreasonably low, Union's bargaining position was much stronger than the landowners, and Union induced the landowners to sign the Gas Storage Agreements with promises that were not kept and by misrepresentation as to the nature and content of the agreement. Mr. Tennyson supported Mr. Giffen's argument on this issue.

In support of the allegation of unconscionability Mr. Giffen cited the evidence, which he stated is uncontradicted, that fair market value of the least cost alternative to Union would be $1,950 per acre per annum in 1980 and that in contrast Union is paying the Applicants a mere $7.00 per acre per annum in perpetuity. For reasons detailed in Part III hereof the Board does not agree with Mr. Giffen's submission as to fair market value. His reliance on this evidence to support the allegation of unconscionability is, therefore, ill-founded and his argument is rejected by the Board.

An analysis of the table prepared by the Central Ontario Appraisals (Exhibit 103) indicates that in the period 1972 to 1974 Union's payment of $5.00 per acre per

annum to landowners in the Bentpath Pool was neither the highest nor lowest payment among lessees for gas storage rights in Lambton County, nor was it the highest or lowest paid by Union to its lessors. The Board does not find that "the total facts in this matter shriek of unconscionability." It cannot be said that the landowners were coerced into signing the agreement, in any way, or prevented from obtaining independent advice, or that the amounts paid to them under the various lease agreements were out of line with payments being made to other landowners in the same general vicinity for the same type of rights at that time. In short, the Board concludes that the evidence does not support a finding of unconscionability.

The parties having standing before the Board on the issue of compensation therefore are the Higgs, the Smits, the Township of Dawn, Achiel Kimpe, and the Graham Turners.

PART III

Compensation

Effect of Board Order E.B.O. 46 on Storage Payments

It was claimed on behalf of the Kimpe Applicants that certain payments that they were entitled to under the various leases and agreements had not been received and as such the agreements should be declared void. Evidence was submitted detailing the payments made by Union to each landowner and in addition, Mr. Giffen called Mr. Bowman, who had analyzed payments made to the McFaddens, Thomases and Turners.

The evidence before the Board is that although several of the Applicants had expressed their concern that the payments were insufficient, there was no evidence filed to show that they had in fact objected to Union changing the payments from 'in advance' to 'in arrears', or that they considered that payments were not being made at all under any lease or the Gas Storage Agreements. In any event, the Gas Storage Agreement has no penalty in the event of failure of the Lessee to comply with the terms of the agreement. And under the Union oil and gas leases which included storage, the lessor was required to give Union thirty days notice

of any default so that it could be removed before the lease could be declared void. Since such notice was not given by the lessors prior to this proceeding, the Union lease agreements cannot be considered void for reasons of non-payment. The Board concludes, therefore, that none of the leases or the Gas Storage Agreements is voidable on the grounds of non-payment.

The Act requires the Board to determine the amount of compensation payable to the owner of storage rights which are not subject to agreement. The Board agrees with its counsel that the Board is not a collection agency, but since the landowner's storage rights were taken as of July 31, 1974, the date of first injection, the period from 1974 to 1982 must be considered and recognition must be given to payments that have already been made by Union. A determination of outstanding compensation due to an Applicant necessitates an analysis of payments to determine under which leases, agreements or Board Orders they were made.

In reviewing the amounts that have been paid by Union under the various agreements, it appears that payments were made in full under the individual agreements prior to Board Order E.B.O. 46 being issued and also under Union's interpretation of the Unit Operation Agreement that formed part of Board Order E.B.O. 46. However, it is questionable whether payments under the Gas Storage Agreements have actually been made by Union.

The Gas Storage Agreements assigned the storage rights to Union with compensation set at $5.00 per acre per year, payable annually in advance, on the anniversary date of the agreement. Five out of the eight Gas Storage Agreements were dated May 1, 1970, two on May 5, 1970 and one on April 29, 1970. Payments were made in accordance with these agreements for the periods 1970 to 1971 and 1971 to 1972.

Board order E.B.O. 46 was issued on March 6, 1972, and, the Board, at page 12 of its Reasons for Decision in E.B.O. 46, made reference to Union's proposed payments under the Unit Operation Agreement and noted that:

> "These payments are in substitution for all payments under the petroleum and gas production leases and gas storage agreements and appear to have been designed to remove the inequity between the Union and Imperial lessors arising from the fact that the Union lessors signed away their storage rights for no present consideration other than the holding rental under the production leases, whereas the Imperial lessors are compensated not only by the holding rental under the production leases, but also by the separate storage rental under the Union gas storage agreement."

Union concluded that the Board Order amended both oil and gas leases and Gas Storage Agreements so that payments were no longer made in accordance with the agreements that had been signed, but were now made in accordance with Union's interpretation of the terms of the Unit Operation Agreement (See page 19 herein). Those landowners with acreage in the participating area received royalties as gas was produced and those outside

the participating area received the minimum annual rental, in arrears. It will be noted from page 19 herein that the applicable section of the Unit Operation Agreement requires that the lessors be paid by the lessee not later than the 31st day of January, next following, an amount per acre that will bring the total received from royalties and any payments for underground storage rights from any source up to a minimum of $7.00 per acre per year for that land within the unit area and $5.00 per acre per year for land outside the unit area. This does not amend the Gas Storage Agreements but provides for a common minimum payment to all landowners.

It should be noted that neither the Board's Reasons for Decision nor the Order in E.B.O. 46 amended the Gas Storage Agreements or specifically approved or required any adjustment to the timing of payments under the Gas Storage Agreements. This is not surprising, since Union had indicated during the course of that proceeding that it considered storage and compensation for storage to be outside the Board's jurisdiction in that particular proceeding. In the subsequent proceeding that dealt with the designation of the Bentpath Pool as a storage area, E.B.O. 64, the agreements were referred to, but again neither the Board's Order, nor the Reasons for Decision altered or amended those existing Gas Storage Agreements.

Reference to the remittance vouchers used by Union, show that prior to 1977, the terminology used was

"Expires indef. Not advanced. Unit agreement Bentpath Pool Unit." From 1977 onwards, the terminology is similar, except the words "unit agreement" are replaced with "storage payment", followed by the Gas Storage Agreement number for each landowner. Although the terminology changed in 1977, the amount paid by Union to the landowners was still calculated in accordance with the Unit Operation Agreement approved in E.B.O. 46.

The evidence before the Board, therefore, is that the Gas Storage Agreements have not been amended by any action of the Board or the lessors, and as such $5.00 per acre per annum should have been paid to the lessors in advance. Nor does the evidence show that the level of compensation for storage rights was set at $7.00 per acre per annum as alleged by Union. Oil and Gas leases taken by Union that included storage were amended by E.B.O. 46 and as such it appears that payment was made under those leases. The landowners without storage agreements have in fact, received payments under the Unit Operation Agreement. Since the Unit Operation Agreement established the minimum payment under the oil and gas leases, but could not establish compensation for storage since that matter was not before the Board, then these landowners have not received any payment for storage from July 31, 1974 to date.

In summary then, the Board finds that Board Order E.B.O. 46 did not amend or alter the payments to be made

for gas storage rights to those landowners who had signed Gas Storage Agreements, nor did it directly or indirectly set the level for gas storage compensation at $7.00 per acre per year.

Principles of Compensation

The Applications by the landowners were made pursuant to section 21 of the Act. That section provides that an appeal from a determination of compensation by the Board must be to the Divisional Court under section 33 of the Expropriations Act R.S.O. 1980 C. 148.

Since the above acts include several cross-references one to the other, it became an issue in this proceeding whether the Board should make its decision on compensation solely on the basis of the Ontario Energy Board Act, or whether the Expropriations Act, or particular sections of that act, or the common law should influence its decision.

Union noted that the Board, in at least two Reasons for Decision issued in designation proceedings, has stated that approving the designation of an area for storage has the effect of expropriating storage rights from those within the area who had not signed a storage agreement. Union argued that these Board decisions together with section 2 of the Expropriations Act, require that the determination of compensation by the Board be undertaken using the general principles of compensation as set out in section 14 of that act. Union also argued that the procedural requirements relating to storage matters before the Board were governed by section 35 of the Ontario Energy Board Act.

Mr. Giffen, for the Kimpe Applicants, considered that the Board, having been given the widest powers by the Legislature to deal with compensation and such matters as agreements, should determine fair, just and equitable compensation without recourse to the principles that are intended to govern the determination of compensation under the Expropriations Act.

He submitted that Union was not in a position to ask the Board to take the Expropriations Act into consideration since Union had not complied with the procedures specified in that act. He pointed out that the courts in the past have required a strict compliance with the procedural requirements of expropriation statutes and argued that since Union had not complied with the procedures set out in the Expropriations Act it would have to start the process all over again if it wished to apply any portion of the Expropriations Act to the determination of compensation.

The difference between the "taking" of property, generally dealt with in expropriation proceedings, and the "entering" and "use" terminology used in section 21 of the Ontario Energy Board Act, was noted by Mr. Giffen. He argued that "entering and use" was not an expropriation and that the Board should set "fair, just and equitable compensation" as required by section 21(2). He agreed with Union that the procedural requirements for storage matters were governed by section 35 of the Ontario Energy Board Act.

Mr. Tennyson's submission on behalf of certain landowners in the Payne Pool area generally endorsed the arguments of Mr. Giffen and in particular dealt with the principles of compensation. He submitted that the Board should consider all the issues of compensation and not limit itself solely to the narrow grounds of the law of expropriation. These landowners were concerned that the Legislature, through the provisions of the Ontario Energy Board Act, has "taken away the rights of the private landowners to sell this gas storage resource to the highest bidder in a free and open market". They, therefore, asked the Board to take the statutory limitations imposed by the Act on their ability to sell their rights into consideration when fixing fair, just and equitable compensation.

Board Counsel traced the numerous amendments to both acts and concluded that the Ontario Energy Board Act governs as far as the procedure to be followed is concerned, but that the principles set down in sections 13 and 14 of the Expropriations Act should be followed in establishing the level of compensation.

The Board having reviewed the evidence and the arguments of all counsel, concludes that it has two issues to decide in order to establish what principles or precedents should guide it in setting compensation. The first is whether the taking of the landowners storage rights constitutes expropriation, the second is the

extent to which the relevant statutes and the common law should be considered by the Board in determining compensation.

The Board, in Reasons for Decision E.B.O. 64, stated that the granting of Union's application had "the effect of expropriating the storage rights" of two private landowners and the Township of Dawn. It would therefore seem that the Board, at that time, considered that the taking of storage rights was akin to an expropriation.

Subsequent to the designation of an area as a storage pool, a Board Order appoints an exclusive operator. In the case of Bentpath, it was Union. Once such an order has been issued storage rights that have not been assigned to the operator have no value to the landowner because he cannot independently use them. In effect they have been taken from the landowner without his consent. The definition of "expropriation" in the Expropriations Act includes "the taking of land without the consent of the owner by an expropriating authority". In the same act, "land", is defined to include "any right or interest in, to, over or affecting land". In this case the subject is a "right or interest in" land, and Union is in effect the expropriating authority through the approval of the Board.

The Board has concluded that the distinction between "entry and use" and "taking" referred to by Mr. Giffen

is really a distinction without a difference in this case and that for all practical purposes the landowner's rights have been expropriated.

The sections of the Expropriations Act that appear to have relevance in this matter are section 2(1) and (4), section 4(1) and (2) and section 12. These are as follows:

Section 2:

"(1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.

"(4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails."

Section 4:

"(1) An expropriating authority shall not expropriate land without the approval of the approving authority as determined under section 5.

"(2) Subsection (1) does not apply to an authorization of the Ontario Energy Board under the Ontario Energy Board Act in respect of storage of gas in a gas storage area or to an expropriation authorized under section 49 of that Act."

Section 12:

"Section 21 of the Ontario Energy Board Act applies in respect of the use of designated gas storage areas."

The Board considers that section 2 expresses the intent of the Legislature that the Expropriations Act should apply in all cases where a property owner could be deprived of property, or rights associated with that property.

The Board is also satisfied that sections 4 and 12 of the Expropriations Act would preclude any application under that act with respect to matters associated with the storage of gas. Those sections also establish the Board as the approving authority for gas storage designation and pipeline expropriations. Mr. Giffen is, therefore, in error in suggesting that Union would have to start expropriation proceedings under the Expropriations Act before the remaining applicable provisions of that act can be considered.

Section 21(1) of the Ontario Energy Board Act establishes the Board's power to authorize a person to inject, store, and remove gas and section 35 of the Act sets out the procedures to be followed with respect to the designation of a gas storage area. Since the application by Union that resulted in the designation of the Bentpath Pool as a storage area was brought under these two sections of the Act, the Board concludes that the correct procedures have been followed and that those procedures do not preclude the consideration of the Expropriations Act in this proceeding.

Section 21(4) of the Act is as follows:

> "(4) An appeal within the meaning of section 33 of the Expropriations Act lies from a determination of the Board under subsection 3 to the Court of Appeal, in which case that section applies and section 32 of this Act does not apply."

This section makes it clear that the Legislature intended that an appeal from a determination of

compensation by the Board would be to the Divisional Court under section 33 of the Expropriations Act.

On the basis of the foregoing the Board has concluded that the determination of fair, just and equitable compensation must include recognition of the principles contained in the Expropriations Act.

During this proceeding many cases were cited by the participants, with a view to establishing the state of the common law with respect to the determination of compensation for an expropriation. The Board does not consider it is necessary to summarize the various cases that were cited but believes that the case of Farlinger Developments Ltd. v. Borough of East York (1973), 5 L.C.R. 95, 127 (LCB); varied (1975), 8 L.C.R. 112 contains one of the most recent and perhaps the most explicit interpretation of section 14 (1) of the Expropriations Act that has been expressed by the courts. In that case the Ontario Court of Appeal held that "In an expropriation there are really two fundamental steps, the first is to determine the highest and best use of the property expropriated and the second is to fix the compensation awarded to the owner based on such use." The definition of "highest and best use" was quoted from a previous hearing of the Ontario Land Compensation Board as "the highest economic use to which a buyer and seller, each willing and knowledgeable, would reasonably anticipate the lands would probably be put."

In this proceeding the issue is of course the compensation that should be payable for storage rights rather than the outright acquisition of land. Nevertheless, the Board is satisfied that recognition must also be given to the established common law with respect to expropriation matters.

With respect to the probability of the use of those storage rights, it must be remembered that the application by Union in 1974 was for the designation of the Bentpath Pool area as a natural gas storage area. It was, therefore, almost a certainty rather than a probability that the highest and best use of the subterranean void under the designated area would be for the storage of natural gas.

Bentpath Compensation

It is clear in this proceeding that the Applicants are dissatisfied with the treatment accorded them by Union. This dissatisfaction apparently results from their belief that the payments for storage rights received to date, the offer made when they were asked to sign the Gas Storage Lease Agreement and the subsequent offer of $12.36 per acre per year, were all inadequate.

Section 21, subsections (2) and (3) of the Act, which provide for a landowner's right to compensation for gas storage rights, read as follows:

> "(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),
>
> (a) shall make to owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
>
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order.
>
> (3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount thereof shall be determined by the Board."

Under Part II of these Reasons for Decision the Board has concluded that Kimpe, the Graham Turners, the Higgs, the Smits and the Township of Dawn all have standing before the Board in this proceeding and as such they are entitled under section 21(3) to have the Board

determine the amount of compensation that should be paid for their rights to store gas. Those landowners that have agreements have no standing before the Board in this proceeding, and Union is legally required only to pay the amount of compensation required by such agreements. For obvious reasons it is desirable that all landowners in a pool be treated equally and the Board would encourage Union to adopt a uniform treatment for all landowners in the Bentpath Pool. It recognizes, however, that it does not have the jurisdiction to order Union to do this.

In weighing the evidence and determining the amount of compensation that should be paid, the Board has taken into consideration the requirements of the Act that such compensation should be "just, fair and equitable".

The Board has also accepted that the principles established in the Expropriations Act should be considered in its determination of the compensation payable to the landowners. The sections of that act which contain those principles are sections 13 and 14 which are as follows:

> "13.(1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
>
> (2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,
>
> (a) the market value of the land;
>
> (b) the damages attributable to disturbance;

(c) damages for injurious affection; and

(d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.

14.(1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

(2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner intends in good faith to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement.

(3) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking.

(4) In determining the market value of land, no account shall be taken of,

(a) the special use to which the expropriating authority will put the land;

(b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or

(c) any increase in the value of the land resulting from the land being put to a use that could be

> restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health."

During these proceedings a number of methods of determining compensation, or the market value of storage rights, were proposed by those participating. As a result, the Board was presented with an extremely wide range of possible values, each being supported by a witness who was considered to be an expert in his field.

Union submitted that the calculation of the market value should be based on the report prepared by the Board and submitted to the Lieutenant Governor in Council in 1964. In that report the Board concluded that compensation should be based on the performance rating of a pool and suggested three ratings; excellent, good and fair. The value proposed per million cubic feet of capacity for each of these ratings was 30¢, 27.5¢ and 25¢ respectively, with the total value being distributed to the landowners in proportion to the land owned by each to the productive acreage in the designated area. Union, having rated the Bentpath Pool as "good", had determined that $12.36 per acre per annum should be offered. Revising the rating to "excellent" caused Union, in its argument in this proceeding, to increase the offer to $13.48 per acre per annum.

Throughout the hearing the Kimpe Applicants relied heavily on the value as presented in the Havlena Report prepared by their consultants, Messrs. Friedenberg,

Havlena and Ruitenbeek. The Havlena Report, filed as Exhibit 63, included a determination of the annual rental value for storage rights in the Bentpath area and a value for purchasing the property including storage rights. Values were calculated for each of the years 1974 to 1981 and the annual rental per acre varied from a low of $425 in 1976 to a high of $3,049 in 1979. The outright purchase price per acre varied from a low of $4,192 in 1976 to a high of $28,818 in 1979.

In argument the Kimpe Applicants still favoured the Havlena method but now suggested that other methods which were not presented to the Board during the hearing might be acceptable. Seven methods were proposed by Mr. Giffen and in his order of preference these required that the Board:

1) either accept the Havlena Report as filed with the rental calculated for each year being reduced by one-half to provide for an equal sharing between the landowners and Union's customers (i.e. for 1981 the Havlena calculated rental rate of $1797.00 per acre per year would be reduced to $898.50), or use that Report as the basis for determining the appropriate annual compensation for each year;
2) determine compensation essentially as 1) above except that the amount would be determined for a three-year period instead of each year;

3) base compensation on the sales by one company to another of operating pools such as Wilkesport and Terminus, with the compensation so determined being adjusted to reflect inflation for each year in question;

4) recognize that Union has storage capacity to meet some 40 percent of its annual gas sales and on this basis, instead of halving the annual amounts produced by the Havlena Report, reduce them to 40 percent;

5) allow compensation to track changes in amounts paid for oil and gas leases. It was claimed that since oil and gas leases have increased from $1 per acre in the 1960's to approximately $25 today, the $7.00 per acre currently being paid for Bentpath should be increased by 25 times to $175 per acre per year. Further adjustments should be made in the future as changes in oil and gas leases occur and for any inflationary trends;

6) update the recommendations in the Board's 1964 report. It was suggested that an escalation equal to the increase in the price of natural gas in Eastern Canada since 1964 would produce appropriate rental figures for today. They calculate that the $13.48 would be increased to $94.54 per acre per year for Bentpath at

current gas price levels. The figure would, of course, increase as the price of natural gas increases;

7) alternatively, update the 1964 report using an assumed rate of inflation for the years since that report was issued. They suggest 10 percent per year inflation would be a reasonable average and on this basis the Kimpe Applicants calculated a rate for Bentpath of $75 per acre per year for 1982. This would of course be increased annually in accordance with the annual rate of inflation.

Board counsel filed a study that had been prepared by Central Ontario Appraisals and called Mr. Mason and Mr. Kylie of that company to testify. The study examined several approaches but finally recommended a method for the determination of what the authors considered to be fair, just and equitable compensation for the rights to store gas in the Bentpath Pool. This method consisted essentially of determining the fee simple value for the property based on other property sales in the area and an annual rental rate based on that fee simple value. Mr. Mason considered that the annual rental payable for storage rights should be a maximum of 50 percent of the fee simple rent. For the year 1981, the Central Ontario Appraisals method produced a fee

simple rental of $67.92 to $84.90 per acre per year so that the maximum storage rate would be $33.96 to $42.45 per acre per year.

Throughout the proceedings, Mr. Giffen characterized his clients as being uninformed and without bargaining power at the time that they signed agreements with respect to storage. He suggested that lack of knowledge caused his clients to sign agreements which provided for an inadequate level of compensation. In this respect it is interesting to note that having now received the opinions of several experts on the subject, the Board is faced with a somewhat astonishing range of proposals for compensation, all deemed by knowledgeable people to be appropriate for the Bentpath Pool area.

Mr. Giffen, who has now had over two years' experience and the advice of numerous experts, presented the Board with seven alternatives for 1981 ranging from $68.13 to $898.50 per acre per year. Union, although it has been in the business of storing gas for many years, did not express any corporate opinion, but chose to rely on the Board's 1964 report on storage in Ontario. Board Counsel submitted that the Mason evidence be used as a guide only and, on the basis of the increase in rates paid by Tecumseh and changes in the Consumer Price Index, they recommended that the compensation range found by the Board in 1964 be increased. They also submitted that the Board should determine the level of compensation for two

periods, and recommended that it should be between $15.00 and $25.00 from July 31, 1974 to July 31, 1982 and between $25.00 and $40.00 from July 31, 1982 to July 31, 1987.

It is apparent that the "knowledge" that Mr. Giffen alleged was not previously available to his clients is subjective in that the evidence now before us indicates that its aquisition does not lead to one irrefutable value but, depending on the viewpoint, to a very wide range of possible values. The Board can only conclude that lack of knowledge was in reality a minor factor in the total dissatisfaction of the landowners.

The wide variation of expert opinions now faced by the Board in this case is not unique. In the appeal arising from Runnymede Development Corporation v. The Minister of Housing, (1978) 20 O.R. (2d) 559, affirmed 18 L.C.R. 65 [C.A.]. The court at page 564 referred to the Land Compensation Board's difficulty;

> "The Board finds it difficult to comprehend how two sets of knowledgeable appraisors having the same information as to planning and services, and having available the same records of sales which may be relevantly comparable to the subject properties, can arrive at values for 413 acres of raw land, which, taking the higher and lower of the values in evidence, shows a difference of almost $5 million."

The Court in its decision noted that "it was the Board's responsibility to weigh the conflicting evidence and act upon the evidence that it found to be credible and persuasive." It also pointed out that the Land

Compensation Board was not obliged to accept the whole of the evidence of any witness and could refuse to accept part of the opinion of certain witnesses. The court concluded that the inferences made by the Land Compensation Board "were reasonable in the face of the difficult and conflicting body of evidence it had to deal with," and dismissed the appeal.

In weighing the evidence before it, this Board must now examine each of the alternatives proposed by the participants, in light of the principles and common law referred to in the preceding section.

Section 13 of the Expropriations Act requires that landowners receive compensation based on the market value of the land, but where the market value of the land is based upon the use of the land other than existing use, no compensation shall be paid for damages attributable to disturbance. Section 14 of that act defines the market value of the land as the amount that a willing seller might expect if the land were to be sold to a willing buyer in the open market. The determination of market value of land, however, cannot take account of any special use to which the expropriating authority will put the land, or to the effect on value of the imminence of any development. Section 13 clearly recognizes that market value can be based on a use other than the existing use, whereas section 14 specifically bars the value of land being based on the special use intended by

the exproriating authority, or the change in the value resulting from the imminence of such a development.

The relevent principle in common law has been referred to as the Pointe Gourde Rule the purpose of which was stated in Wilson et al v. The Liverpool City Council, [1971] 1 All E.R. 628 as being:

> "... to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition."

This rule, however, is not interpreted by the courts as restricting the determination of market value to that of value to the owner, or to eliminate consideration of the future potential for the land. In Fraser v. The Queen, [1963] S.C.R. 455, Richie J. referred to the decisions in Cedars Rapids Manufacturing and Power Co. v. Lacoste; Fraser v. City of Fraserville; and Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands as the leading authorities usually quoted in support of the contention that potential value over bare ground could not be considered if solely related to the purpose for which the land was expropriated. He went on to say:

> "None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect

> in any way the value which the property will have to the acquiring authority after expropriation and as an intregral part of the scheme devised by that authority."

With respect to the seven proposals submitted by the Kimpe Applicants for determination of market value, the Board notes that the first two are based on the Havlena Report. This Report established for each year what the authors termed the "value" of the Bentpath Storage Pool by an economic analysis of the market conditions and the alternative methods that Union might use to meet the demands of its customers if storage were not available. They concluded that purchasing from TransCanada PipeLines under various rate schedules would be the least cost alternative and calculated the cost addition that would be involved were Union to adopt that alternative. This additional cost was considered to be the value of storage and the annual value or rental was determined from this on a per acre basis and the purchase value was determined by discounting the yearly value by rate of return.

The Board considers that the values produced in the Havlena Report are a measure of the gross margin, or contribution, to Union as a result of the use of storage. This margin could not be realized without Union's distribution system and Union's customers. It clearly is a calculation of the value of the storage rights to the expropriating authority, namely Union. It has been noted that the consultants made no claim that

the value determined in the Havlena Report was that which might be paid in the open market to a willing seller by a willing buyer.

The methodology used in the Havlena Report was largely unchallenged in this proceeding and the Board does not propose to deal with it in detail. It should be noted, however, that the application of that methodology to other companies, such as Tecumseh which purchases no gas other than for compressor fuel, or Consumers' Gas Company Ltd., which has little storage, would produce substantially different values for storage rights, even in the same area.

The Board concludes that the methodology used in the Havlena Report is limited in application and fails to comply with the principles established both in the statute and in common law and as such cannot be used for the determination of the market value or of compensation for storage rights.

The Kimpe Applicants' third preference requires that the Board determine compensation on the basis of a comparison with prices that are being paid by storage companies to acquire pools from other companies. Mr. Giffen also requested the Board to recognize the one case in Michigan where landowners organized and forced the utility to pay a higher price. The Kimpe Applicants claim that the prices paid by a storage company for gas storage rights reflect the market value and point out that in such a sale both parties are knowledgeable.

The Board will disregard the Michigan case for two reasons. First, the transaction was not between willing parties, rather the utility was "driven" to meet the demands by the circumstances of that time. Second, the law in Michigan is different from the law in Ontario.

The Board is of the opinion that there is no similarity between the outright purchase by one company from another of an assembled pool area or an operating pool area, and the rental of storage rights from a landowner. In acquiring new storage rights from a landowner in an unexplored area it is the operating company, not the landowner, that incurs a risk that the area may not be suitable for storage, that market conditions may not permit economic development and use of the area for storage, or that after development the costs involved with operation of the particular pool may be too high. However, when a company purchases an assembled area most, if not all, of this risk has already been borne by others. The purchasing company generally has available to it geological information, the drilling experience associated with the pool and data relating to the production and operation of the pool. This information normally forms part of the sale from one company to the other and it can effectively eliminate much of the initial risk associated with development of the pool for storage. The value that the two companies place on the

geological and operating data, the assembly of a pool area, or any residual risks appears to the Board to be quite separate from the annual rental paid to landowners for storage rights, which rental continues to be paid to landowners regardless of change of ownership.

From the above it is apparent that the price paid by one company to another for the right to operate a particular pool has no bearing on the market value of storage rights. The Board, therefore, rejects this as a method of determining market value.

The Kimpe Applicants' fourth method of fixing compensation again relied on the Havlena Report and for reasons stated above the Board rejects this as a reasonable method of determining market value or compensation.

With respect to the fifth method proposed by the Kimpe Applicants, it should be noted that when the Board approved $7.00 per acre per year in E.B.O. 46, it pointed out that it was to be a total figure including all payments received for oil and gas rights and storage. In addition there is no evidence before the Board that demonstrates that the rental for oil and gas rights is related to the rental for storage rights. It would, therefore, be inappropriate to use the $7.00 as the base figure, and to increase this in the manner proposed by the Kimpe Applicants.

In view of the variation in payments required under the original oil and gas leases and since E.B.O. 46

specifically amended these leases, the Board considers this approach to be inappropriate in the circumstances.

The sixth method proposed by the Kimpe Applicants seems to suggest a link between the value of storage rights and the price of natural gas in Eastern Canada. The price of gas at the Toronto city gate is now set by the Canadian Government under the Petroleum Administration Act and is outside the control of both Union and TransCanada PipeLines. The Board cannot accept that changes in the level of tax imposed on all Canadians through gas sales, or the imposition of a Canadianization tax, should have any impact on the value of storage rights in Ontario, nor that increases in the cost of gas should impact directly on storage rights or their value.

The Board can find no support for the claim that there is such a relationship between the price of gas and the market value of storage rights and so rejects this proposal.

The seventh and final method proposed by the Kimpe Applicants suggests that Union's offer of $13.48 per acre per year be increased annually on the basis that the annual average rate of inflation has been about 10 percent for the 1974 to 1982 period. There was, however, no evidence filed to show that market value of storage rights has any relationship with the rate of inflation or with changes in the Consumer Price Index. The Board, therefore, rejects this approach as a method of determining compensation for storage rights.

The study prepared by Central Ontario Appraisers and submitted by Board counsel in this proceeding contained the recommendation that the market value of storage rights should be determined by the Board using the rental rate developed from fee simple value of the land. Implicit in this method is the assumption that the value of storage rights bears some relationship with the value of the land. In argument, Board counsel did not recommend that the Board adopt the approach proposed by Central Ontario Appraisers but suggested that it could be of some guidance to the Board.

The Board has reviewed the method recommended by Central Ontario Appraisers and concludes that there is no justification for the assumption that there is any correlation between the fee simple value of the land and the market value of the storage rights. It is understood from the evidence before the Board that none of the properties in the Bentpath Pool area was purchased for the storage potential but for the use of the top few centimetres of the land and any buildings thereon. That oil and gas was later discovered under such property must be considered a windfall to a landowner who has incurred no expense, expended no effort, and has not been exposed to any financial risk. Similarly, if the pool should later prove to be suitable for storage then this must be considered as an additional windfall. The use of the top few centimetres of soil has not been affected in any way,

except for those landowners where wells have been drilled, and in those cases only a few square metres of surface are required.

The evidence presented by the real estate appraisers suggested that the difference in value per acre for land located in a storage pool area, compared to land located outside a storage pool area, is insignificant. The Board, therefore, concludes that the presence of storage is not detrimental to land values, and that a reasonable level of rental rates for storage rights does not cause land values to inflate.

The Board agrees with its counsel that the Central Ontario Appraisers method is not suitable for the purposes of determining compensation in these circumstances.

The Board's responsibility in this procedure is to determine the compensation that would have been fair, just and equitable at the time that the storage rights were effectively expropriated from the landowners, that is July 31, 1974. The Board considers that it must also determine if the compensation continues to be fair, just and equitable as of the present and to make any adjustments that it considers necessary.

The offer made by Union to the landowners of the Bentpath Pool was based on the Board's 1964 report; a report that was based on data that was some ten years out of date as of the date of expropriation of the storage

rights, and is currently some 18 years out of date. Since much of the basic rationale with respect to storage remains unchanged, the Board's report is of considerable assistance. However, it must be recognized that values in general have increased during the intervening years.

When considering the Board's 1964 report, it should also be recognized that the report was the response to a reference of the Lieutenant Governor in Council that required the Board "to adjudicate on and examine and report on the following questions respecting energy:

"1. Payments with respect to storage of gas in designated gas storage areas.

2. Terms and conditions of Gas and Oil Leases.

3. The Gas and Oil Leases Act."

The Board was, therefore, not dealing with a question of expropriation of rights and due compensation, and was not constrained by the requirements of any statutes. The Board, in fact, declined to set specific compensation for any pool, because the fixing of rates for certain landowners in Dawn No. 156 Pool was to be the subject of arbitration before the Board at a later date and an appeal to the Ontario Municipal Board with respect to the Payne Pool had yet to be heard.

In essence, the Board in that report noted that earlier settlements for storage rights represented an annual rental of approximately 16 ¢ per million cubic feet of capacity and the latest one prior to the 1964

report had increased to approximately 19 ¢ per year per million cubic feet. Using this as a basis and giving "a good deal of weight to the increased use and usefulness of storage during the past thirteen months," the Board considered that rates should be substantially higher. It concluded that pinnacle reef pools should be categorized according to the performance ratings, namely; excellent, good and fair, and that the rates per million cubic feet of storage capacity, should at 30¢, 27.5¢ and 25¢ respectively. The figure of 30¢ per million cubic foot of storage capacity was used by Union to calculate the figure of $13.48 per acre per annum which has now been offered to the Bentpath Pool landowners.

It is interesting to note that in 1964, the Board was aware of a growing requirement for gas storage and that it gave weight to this in recommending the rental payments. This growing requirement appears to have been reflected in some of the rental rates paid in Ontario. Rates for the pools referred to as Dawn 1 and 2, designated formally in 1950, were apparently the subject of prolonged negotiation between Union and the landowners; subsequently resulting in an adjustment to $7.50 and $6.00 per acre per annum respectively in 1957, made retroactive to 1951. Union later responded voluntarily to the Board's 1964 report by increasing rates to all pools it operated for storage in accordance with the Board's recommendations. The increase varied from $3.60

to $8.88 per acre per year but Union did not respond to the May 4, 1964 report until August 1, 1967. No further increases in rental rates have been made by Union since 1967.

Tecumseh, on the other hand, appears to have shown a greater willingness to adjust rental rates. The landowners in the three pools originally used by Tecumseh - Kimball-Colinville, Seckerton and Corruna - received an increase from $5.00 per acre to $6.00, $8.75 and $8.60 respectively in 1964. Although these rates did not exactly correspond to those suggested in the Board's report, being somewhat higher, they appeared to represent a voluntary acceptance of the Board's concern that unit capacity and quality of each pool should be recognized in the pricing structure. In 1976 however, these rates were voluntarily increased again to a uniform $15.00 per acre, and in 1981 they were again voluntarily increased to a uniform $21.50 per acre. Apparently Tecumseh concluded that a differential based on pool performance was no longer justified.

In course of the study undertaken by Central Ontario Appraisers, a survey was made of gas storage lease agreements entered into between landowners and various companies in Lambton County. They concluded that the wide range of acreage rates paid was such "that no logical conclusion as to 'fair, just and equitable compensation' can be obtained from the leases." The

Board agrees with this observation, but considers that the survey data does produce some useful information. Of significance is that there were some eleven companies actively seeking storage rights in the county during the years covered by this survey. In addition, while there is a considerable variation in the rental rates being paid prior to actual use of the storage areas, there is an indication in the agreements that the rates that will be paid when and if pools are used for storage have been increasing during the years covered by the survey. For example, earlier agreements taken by McClure Oil Company carried a provision that use for storage would result in a renegotiation of annual payments within the range of $5.00 to $13.00 per acre, whereas by 1976 the range had increased to $15.00 to $30.00 per acre. Dow Chemical signed agreements between 1977 and 1980, which contained a requirement that the rental rate would be renegotiated between $20.00 and $30.00 per acre per year when the area is to be used for storage.

The number of companies that are or have been in the market place, the increase in the rental rates currently being paid, or that will be paid when the pools are used for storage, supports the observation by counsel for IGUA that there is in fact a market in existence and that market forces are causing rental rates to increase.

The Board concludes that direct reliance cannot be placed on the rates found appropriate by the Board in its 1964 report. In that report the Board appeared to recognize the existence of a market, in that the recommendations of that report were apparently based on the rates actually being paid in Southwestern Ontario at that time and trends that were perceived by the Board as to the future use and usefulness of gas storage. It is noted that the latter point could be considered as introducing an element of "use to the taker" or reflecting the scheme for which the property was expropriated. However, the Board is satisfied that some recognition can be given to the potential for land or rights without specific consideration of the value that might be ascribed to the storage as a result of the expropriation. The Board also recognizes that, as pointed out by Consumers' Gas during the hearing that led to the Board's 1964 report, a porous rock formation under a landowner's property is an asset that is reusable, unlike minerals which once removed are gone forever. The landowner in this case has lost the right to use the asset, not the title to the asset.

The right to use the asset can of course be relinquished by the operating company and perhaps for this reason the most accepted form of compensation for storage rights in Ontario is the annual rental per acre. The Board accepts the annual rental as being the most appropriate method of compensation in such cases.

On the basis of the foregoing, the Board believes that the appropriate method to determine compensation for landowners in the Bentpath Pool that will be fair, just and equitable is to use the market at a point in time, and to recognize any relevant trends which are evident for the future.

The Board can determine a rental rate that would be appropriate for 1974, but is then faced with the knowledge that changes in circumstances since that date are such that the rate should be higher now. The concern expressed by Union that the Board should only determine compensation on a "once and for all basis" has been noted. The Board considers, however, that while such a determination may well be appropriate for an expropriation of land where title is transferred, it would not be appropriate where the issue is the compensation to be paid pursuant to a Board Order. The Board also takes comfort from section 16 of the Act which reads:

> "16. The Board in making an order may impose such terms and conditions as it considers proper, and an order may be general or particular in its application."

The Board, while not sharing Union's view that rates should be set once and for all, does agree that some stability is required and that adjustments should not be made at too frequent intervals. The Board will, therefore, set a rental rate for the period 1974 to 1982 inclusive and a rate from 1983 to 1990 inclusive. Both

rates will be somewhat higher than the rate considered appropriate for 1974 and for 1983, but are not necessarily the average of the two periods in question.

The Board, having reviewed carefully the evidence placed before it including the 1964 report issued by the Board and the many submissions, recommendations and proposals in this proceeding; having concluded that there is a market operating in Ontario with respect to gas storage rights; having examined the rates most recently accepted by landowners in the market place and noting the trends; having noted the adjustments made to rates by Tecumseh from 1960 to present, concludes that fair, just and equitable compensation for the Bentpath Pool for the period 1974 to 1982 inclusive will be $18.50 per annum per acre, and for the period 1983 to 1990 inclusive, it will be $24.00 per annum per acre.

The Board notes that E.B.O. 46 amended the oil and gas leases held by landowners so that differences between the agreements would be eliminated and all would receive $7.00 per acre per year, including income from storage agreements.

The Applicants with standing before the Board in this hearing are those who do not have agreements, either because agreements were never signed, were void ab initio, or expired by the date of first injection. The annual amount paid to each of these landowners pursuant to Board Order E.B.O. 46 has therefore been

totally on account of oil and gas rights. The Board has determined the compensation to be paid for storage rights to these Applicants to be $18.50 per acre per annum up to and including 1982 and $24.00 per acre per annum from 1983 up to and including 1990. These amounts shall be paid in advance on or before the 15th day of January of the subject year and shall be in addition to the payments provided in Board Order E.B.O. 46 for the oil and gas rights. Compensation in respect of storage rights beyond 1990 will be renegotiated taking into consideration the circumstances of that time. In the event that the parties cannot agree on compensation and there are no agreements subsisting at that time between the parties, either can again apply to the Board under section 21 of the Act, or any successor act, to have the Board determine future compensation.

The above compensation or rental rates shall be paid to the landowners who do not have valid agreements with Union for storage, namely the Higgs, the Smits, Kimpe, the Graham Turners, and also to The Township of Dawn. As indicated earlier the Board believes that it would be appropriate if Union, in the interests of fairness, equity and good public relations, offered the same compensation to all other landowners in the Bentpath Pool.

The Board has considered the provisions of section 35(1) and (4) of the Expropriations Act and has

concluded that interest should be paid to the above named landowners on all outstanding amounts from July 31, 1974 to the date of payment at the rate of 11.98 per cent per annum, not compounded.

Compensation For Gas or Oil Rights

Mr. Giffen, on behalf of the Kimpe Applicants, claimed that compensation for the gas remaining in the Bentpath pool at the time injection commenced for storage (the residual gas) should be priced at 12.5 percent of the now current gas price. He further claimed that all of the gas in the pool was the property of the landowners so that residual gas volumes should be calculated down to zero psia, not to 50 psia bottom-hole as used by Union.

Board Order E.B.O. 46 approved a Unit Operation Agreement that provided for payment to the lessors of 2 cents per Mcf for all gas produced, saved and marketed. The evidence before the Board is that there remained in the pool at the time of the injection a further 466,216 Mcf of gas that could have been produced, saved and marketed. The Board is satisfied therefore that the only loss suffered by the landowners is that these volumes were not produced in 1974, and as a result of the pool being used for storage, it is unlikely that they will ever be produced.

The Board is not persuaded by Mr. Giffen's arguments. The submission that residual volumes should be calculated to zero psia is rejected since the evidence before the Board is that below a bottom-hole pressure of 50 psia gas cannot be economically produced, saved and marketed. The residual gas that could have been economically produced in 1974, but it wasn't. Union could have

offered payment prior to 1982 but apparently didn't. The appropriate penalty to Union is to require payment of interest rather than adjust the unit cost to reflect the current price which no longer bears any resemblance to the cost of production but has been inflated by the action of governments.

The Board will, therefore, require Union to pay to the lessors the appropriate amounts in proportion of their land in the participating area to the total participating acreage less that held by the Township of Dawn, as if the residual volumes of 466,216 Mcf had been produced on July 31, 1974. The rate to be used in calculating the payments shall be 2 cents per Mcf. Union will also pay interest on the outstanding amount for each landowner at the non-compounded interest rate of 11.98 per cent per year for the period that the amount has been outstanding.

Since the Township of Dawn was prohibited from participating in royalty payments for gas produced from the Bentpath Pool, it should not receive any portion of the amount to be distributed in payment for the residual gas.

Compensation for Damages

The only damages claimed by the Kimpe Applicants are in respect of the annual payments for well sites located in the pool area. Currently, the payment being made to landowners by Union is $100 per well per year, and it is the Kimpe Applicants' contention that this should be increased to $1,000 per well per year. They support this claim on the basis that the value of property in the area has increased at least ten times since Union first used $100 per well per year in the Bentpath area.

Most landowners do not have wells on their property. Those that are affected in the Bentpath Pool are the McFaddens and Donald Cameron Sanderson, each having three wells located on their property, the Turners and the Graham Turners, each having one well.

Board Counsel pointed out that of the above, all are covered by valid agreements with the exception of the Graham Turners whose agreement expired and as such the Board has no jurisdiction to make changes in compensation except for the Graham Turners. Board Counsel made no comment on the Applicants' claim that the rate should be changed from the current levels, but they did recommend that payment should be made for all wells, for the period from July 31, 1974 to December 28, 1977, and that interest should also be paid on the outstanding amounts.

Well payments that have been made by Union have been made under the terms of agreements with Mr. Sanderson and

the Graham Turners. The well payments to the McFaddens and to the Turners have been made gratuitously, since the oil and gas lease entered into between these landowners and Imperial and the Gas Storage Agreement entered into with Union contain no provision for well payments. The Board understands Union decided to make the payments gratuitously in order to maintain uniformity throughout the pool area.

The clause in the Union Agreement of Lease that relates to well payments permits Union to determine which lands covered by leases held by it shall be included in a storage area and requires that notice of such determination shall be given in writing to the owners of such land. When notice has been given then the rights and privileges granted by the agreement continue as long as gas is being stored in the designated area or any part thereof. The agreement states that "the Lessee shall pay to the landowner $100 per year per well for each well drilled for the storage of gas during the term of this lease and such extension thereof."

In the case of the Bentpath Pool, Union commenced storage operations in August 1974 but failed to give any Notice of Determination until December 28, 1977. Well payments have been made since the date of the Notice of Determination but not for the period August 1974 to December 28, 1977. Union's witnesses could not explain why the Notice of Determination had been delayed, or why

December 28, 1977 was deemed to be the appropriate date for such notices and for the commencement of the well payments.

The Board notes that Union, in applying to the Board for designation of the area, had exercised its right to determine that land covered by these leases was to be included in the storage area. The Board finds great difficulty in understanding why, when the Board approved designation, Union did not comply with its own agreement and issue a Notice of Determination. It appears evident that in this case the landowners have suffered a financial loss because of the failure of Union to comply with the terms of its own agreement. The Board will require Union to make payment in the amount hereafter determined to the Graham Turners for one Well, B7, from first injection to December 28, 1977, together with annual interest at 11.98 percent, not compounded, for the period involved, and would urge Union to make similar payments to the other landowners with wells on their property.

The Board notes from Exhibit 62-1 that Tecumseh had established a payment for surface use, for whatever reason, at $150 per acre or part thereof and that this amount had been voluntarily increased in 1978 to $250 per acre or part thereof. On the basis of this information and the evidence as to the increase in land values it is apparent that the $100 per well site per year is inadequate under current conditions. Because of the

minimal impact on a landowner's property, the Board does not consider it necessary to increase the rental rates by the factor proposed by the Kimpe Applicants; neither does it consider that an annual adjustment should be made between 1974 and 1982 as suggested by them. Accordingly the Board will require that the $100 rate remain in effect up to and including 1981.

The well payment of $100.00 per well per year was established as long ago as 1951 in the Bentpath area and since the Board is now increasing the storage rate by a factor of about 2 from 1964 when the Board's report was issued, it would appear equitable to increase the well payment rate somewhat more than the storage rate. Also recognizing the level of well payments being made by others the Board concludes that well payments should be at the rate of $300.00 per year per well for the period from 1983 to 1990 inclusive. Again, this rate will apply to the Graham Turners, but the Board would urge that this rate be applied to all other landowners in the Bentpath Pool with wells located on their property.

PART IV

Application to Rescind or Vary E.B.O. 46 and E.B.O. 64

As previously noted, in an Application dated March 18th, 1981 ("The Application to Rescind"), the Kimpe Applicants requested the Board to rescind or vary orders made by it in E.B.O. 46 and E.B.O. 64. Nine grounds were stated in support of this application.

Board Order E.B.O. 46 ("the Unitization Order") made pursuant to section 24 of the Act, was issued March 6, 1972. The Order provided that Union would be the manager of the unit operation; that the oil and gas interests of those persons having an interest in land in the Bentpath Pool area were all joined and regulated. . .

> "... for the purpose of drilling an operating well and the carrying out of the various matters more particularly provided for in the Unit Agreement as if they and each of them had reached agreement on the terms and conditions set forth in the Unit Agreement and that such joinings and regulations be in accordance with and subject to the terms and conditions set forth in the Unit Agreement";

that the Township of Dawn be specifically excluded from sharing in the benefits of the unit operation; that the boundaries of the unit area could not be altered without Board approval; and that the Order would take effect "only upon revocation of Ontario Regulation 396/70 and shall take affect forthwith upon such revocation". It should be noted, however, that the Unit Operation Agreement, referred to in the Order as the Unit

Agreement, which was attached to and formed part of the Order was deemed to have come into effect on December 1, 1970.

It is a matter of record that all the Kimpe Applicants or their predecessors on title were served by Union's Application in E.B.O. 46; that by letter the majority of the landowners in the Bentpath Pool area stated their opposition to Union's Application; that an opportunity was given to the landowners or their representatives to participate in that hearing; that since the issuance of Order E.B.O. 46 no appeal has been taken and until this Application to Rescind, no attempt had been made to rescind or vary that Order.

Board Order E.B.O. 64 ("the Injection Order") made pursuant to section 21(1) of the Act was issued August 19, 1974. The Order authorized Union to inject gas into, store gas in and remove gas from the Bentpath Pool which had been designated as a storage area by Ontario Regulation 585/74, and to enter upon such lands and to use them for such purposes.

Again, it is a matter of record that all the Kimpe Applicants or their predecessors on title were served by Union's Application in E.B.O. 64; that objections to the Application were received from the Turners, Max McFadden, and Achiel Kimpe; that the Township of Dawn advised the Board of its By-law 40, 1973, but did not object to the Application; that an opportunity was given to the

landowners to participate and Messrs. Kimpe, Richards and Turner did participate; that since the issuance of Order E.B.O. 64 no appeal has been taken; and that until the Application to Rescind, no attempt was made to rescind or vary that order.

To expedite matters, counsel for the Kimpe Applicants and for Union filed a factum or a statement of law and fact relating to this application during the course of the hearing.

Basically, Mr. Giffen submitted that the Board exceeded its jurisdiction with respect to the Unitization Order E.B.O. 46 because that order purported to deal with storage rights and was retroactive to December 1, 1970. Mr. Giffen argued that, in exceeding its jurisdiction, the Board adversely affected the rights of; the Higgs and the Smits by in fact establishing the level of compensation to them for storage at $7 per acre per year in perpetuity; the Graham Turners and the Thompsons by keeping alive their leases which would have otherwise expired; and the remaining applicants by changing the payment dates for storage from payment in advance to payment in arrears. Mr. Giffen also raised the technical matter of the incorrect reference to Ontario Regulation 396/70 as well as several other matters which the Board does not consider material or relevant to the issue.

Mr. Giffen asked the Board now to rescind or vary Order E.B.O. 46 to provide that such order and the

storage payments allegedly made thereunder should not affect compensation or the level of compensation for purposes of the determination made under section 21 of the Act.

The Board has already determined that the Unitization Order did not affect storage rights, the level or timing of payments for storage rights or the lease of the Graham Turners. For these purposes then, there is no need to rescind or vary the order in the manner proposed by Mr. Giffen.

The argument relating to the error in referring to Ontario Regulation 396/70 which was consolidated and renumbered as Regulation 258 R.R.O. 1970 is, in the Board's view, not sufficient ground for rescinding the order. The correctly identified regulation was revoked by regulation 134/72 which was filed on March 20, 1972. That is the date upon which the Board's order took effect. The order was not retroactive as alleged by Mr. Giffen and interpreted by Union. Again, Mr. Giffen has failed to show sufficient cause to justify the rescinding or varying of the Order.

Board Counsel submitted that the Unitization Order should be varied to limit the term of the Order to the period of time during which production of gas took place or to rescind it effective the date Board Order E.B.O. 64 was issued, namely August 19, 1974. Board Counsel pointed out that the purposes for which the Order was

issued have now ceased to exist and therefore there is no need to continue it. In support of this submission, the Aldborough Pool Decision E.B.O. 93 decided in December 1979, was cited. In that case the Board decided first that provided production started within 12 months, the term of the Order would be for ten years or the period required to produce the gas reserves, whichever was less; and second that any existing oil and gas leases should continue except to the extent that they were amended or superseded by the unit operating agreement approved by the Board and that the unit operating agreement could be amended or superseded by any Order of the Board. In that case there were apparently no storage leases granting storage rights to any persons whereas at the date of the Bentpath Unitization Order, storage rights had been obtained by Union from the majority of the landowners in the Bentpath Pool area and there was an intent on Union's part, assuming conditions were appropriate, to use the pool for gas storage at some date after the cessation of production. Accordingly, the Board finds the Aldborough decision distinguishable from this case.

In the Board's view it is not unreasonable to protect gas storage rights leased from others through an underlying and concurrent oil and gas lease. Union clearly intended to have this protection because Clause 3 of the Gas Storage Agreement provides that the landowner shall not lease oil and gas rights to any person upon the

expiration of the Imperial lease, other than to Union. The clause also provides that at Union's request, at any time after the expiration of the Imperial lease and during the lifetime of the Gas Storage Agreement, the landowner shall enter into the Lease and Grant Agreement with Union in the form attached to the Gas Storage Agreement. It appears therefore, that even if the oil and gas rights reverted to the landowners by the revocation of the Unitization Order, Union could require those landowners who signed the Gas Storage Agreement to execute the Lease and Grant and again obtain these rights. The same situation may not apply in a case where Union has a combined oil and gas and storage agreement. The Board is not certain what effect, if any, the revocation of the Unitization Order would have on these leases. The Board agrees with Union that so long as the oil and gas rights are held by Union no one else may drill in the area of the Bentpath Pool. The Board considers this exclusive right to be reasonable under the circumstances. Union's rights to enter upon the lands for purposes of working on the wells and laying field lines are incorporated in the Gas Storage Agreements held by Union, but not everyone signed such Agreement. These rights of Union should also be protected. The Board is aware that, for the most part, the need for the Unitization Order expired when production ceased and the pool was designated for gas storage. The fact remains,

however, that with the revocation of the Unitization Order, the Unit Operation Agreement would also terminate, which could result in the loss of oil and gas rights. The Board accepts that this would not be desirable under the existing circumstances.

The Board is aware, as was pointed out by the Board Counsel, that the prolongation of the Unitization Order continues the different levels of payments being made to the various landowners for their oil and gas rights. The Board expects that with the issuance of these Reasons for Decision the difficulties between Union and the landowners will be resolved and, as noted earlier, hopes that Union will conclude a satisfactory arrangement with the landowners to pay the same rental for oil and gas rights and storage rights to all the landowners in the Pool.

The Board therefore concludes that it would be imprudent at this time to vary or rescind Board Order E.B.O. 46.

Mr. Giffen, in his Statement of Fact and Law also asked the Board to rescind Board Order E.B.O. 64 until Union offered to the lessors in the Bentpath Pool a Gas Storage Lease Agreement amended in a manner set out by him in his Statement. The lessors were also to be given 30 days in which to execute such agreement. Apparently, under Mr. Giffen's suggestion, once the Gas Storage Lease Agreements were signed, the Board would determine

compensation in the present hearing on the basis of the amended Gas Storage Lease Agreement for all landowners who are Applicants. This submission appears to have been altered somewhat in Mr. Giffen's reply argument dated May 14, 1982 where on Page 64 he states:

> "I continue to take the position that those orders were obtained by Union's misrepresentation and they should be rescinded or at least varied to provide that compensation on the basis found in these proceedings in favour of the Township of Dawn, for example, would be extended to all other applicants in the Bentpath Pool."

Board Counsel submitted that to rescind the Injection Order would work an injustice on both Union and its customers as it would deprive Union of its rights to use the pool for storage purposes. However, they pointed to the inequity which would result if Union were to comply with a Board Order issued pursuant to this hearing only with respect to those Applicants whom the Board finds to have standing before it. Accordingly, Board Counsel suggested that the Board reserve its decision in respect to rescinding or varying Board Orders E.B.O. 46 and 64, give Union 90 days in which to offer all the landowners the same compensation as is determined in this hearing and then, depending on what happens in the interim, decide this issue.

Union objected to both submissions but its major concern was that rescinding E.B.O. 64 would deprive it of its benefit and investment in the Bentpath Pool which, it argued, would not be in the public interest.

The Board believes that it is useless to speculate on what would have happened if Union had offered more than $7 per acre per year when it returned to the landowners to have the Gas Storage Lease Agreements signed because, in the final analysis, it was the landowners who refused to sign these agreements which would have given them standing in this proceeding. The Board is disturbed by the fact that it was not fully apprised by the parties of the difficulties that existed between Union and the landowners at the time of the E.B.O. 64 hearing. The Board's understanding of the situation at that time is outlined in its Reasons for Decision E.B.O. 64 dated August 9, 1974 wherein it states on Page 6:

> "The Applicant in this case has offered a new uniform storage agreement to all private landowners in the pool and has undertaken to negotiate an agreement with the Township of Dawn similar to outstanding agreements. The new storage agreement offered to the private landowners (Exhibit 19) provides for the negotiation of compensation, and, in effect, puts all landowners who enter into such agreement in a position where, failing agreement as to the amount of compensation, the amount would be determined by this Board in accordance with section 21 (4) of the Act. The Township of Dawn is similarly in a position of having the amount of compensation determined by the Board if the agreement cannot be reached."

Not only did Union fail to bring the expected events to fruition in so far as the agreements with the landowners and the Township of Dawn were concerned, Union also ignored the statutory and contractual requirements

in a number of instances with respect to the operation of this pool. These instances are well documented in Board Counsel's argument. The issue before the Board is whether Union's actions before, during and subsequent to the injection hearing E.B.O. 64 would justify the rescission or variation of the order issued thereunder.

On this issue the Board has weighed the interests of the landowners as against the interest of Union, and more particularly against the interest of Union's customers, if the order is rescinded and concludes that to rescind the Injection Order would not be in the general public interest. The Board, having reached this conclusion, sees no purpose in reserving its decision on this issue. Accordingly, the Board will not rescind Board Order E.B.O. 64. In these Reasons for Decision the Board has determined fair, just and reasonable compensation for storage rights for those landowners who have no agreements with Union. As noted earlier the Board has no authority to require that this level of compensation be paid to the balance of the landowners in the Pool. The Board agrees with Union that to vary Board Order E.B.O. 64 in the manner proposed by Mr. Giffen would be an attempt to do indirectly what it cannot do directly and therefore, it will not vary the Order in the manner proposed by Mr. Giffen.

PART V

Costs

Section 28 of the Act reads as follows:

> "28 (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs shall be taxed.
>
> (4) In this section, the costs may include the costs of the Board, regard being had to the time and expenses of the Board."

Mr. Giffen asked that costs be awarded to the Kimpe Applicants on a solicitor/client basis, regardless of results. Although he recognized that the Act invests the Board with discretionary powers relating to costs, he submitted that the criteria set out in section 34 of the Expropriations Act should be applied in this instance, that is, that "the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable" be paid by the expropriating authority, in this case, Union.

Mr. Blackburn, in his letter to the Board dated March 30, 1982, stated that it was his position that his clients, the Higgs, are also entitled to costs should the decision of the Board "be in their favour". Mr. Blackburn pointed out that he was involved in

negotiations with Union in 1974 and that he commenced the original application on behalf of the Higgs family.

Union submitted that the only Applicants with any status before the Board are the Higgs, the Smits, and The Township of Dawn and that all other Applicants should not be entitled to any costs. With respect to the Higgs, Union counter-claimed for costs against them because Union was put to the effort and expense of developing a defence to their application and then found that the basis of the claim was not prosecuted. It was Union's position that if costs are to be awarded against it, the costs should be determined by the Board in a lump sum, however, Union urged that a decision should not be made at this time and requested the opportunity to make further submissions on this issue after the Board has handed down its Reasons for Decision.

Board Counsel recommended that those Applicants who are successful should have their costs on a solicitor/client basis and that such costs should be taxed by the Taxing Master at Toronto. Those costs would be paid by Union together with the Board's costs resulting from this hearing.

The Board has considered the argument of counsel and has concluded that pursuant to section 28 of the Act, costs should be awarded to the successful Applicants on a solicitor/client basis and should be taxed rather than fixed in a sum certain.

The Applications carried by Mr. Giffen were in essence a class action on behalf of most landowners in the Bentpath Pool. The Board requires Mr. Giffen first to segregate the solicitor/client costs related to the determination of who is entitled to status before the Board from those related to the determination of the level of compensation. The Board further requires Mr. Giffen to remove from the first category those costs related to the unsuccessful applications of Messrs. McFadden, Pomajba, Richards, Thompson and Turner, including the costs of preparing their evidence and attendance before the Board on their behalf. Insofar as the costs relating to the level of compensation are concerned, it is the view of the Board that these would have been incurred whether or not there was one or more Applicant, therefore, solicitor/client costs related to this aspect of the hearing will be allowed in full. The Board, although it has rejected the applicability of the Havlena Report is of the opinion that reasonable costs incurred in relation to the preparation and presentation of that Report and the attendance of the authors at the hearing should be recovered, as should the costs relating to the other expert witnesses called by Mr. Giffen. With respect to the Higgs, they too are entitled to claim solicitor/client costs in this matter. However, their solicitor took no part in the hearing once it began and certainly did not make any contribution to a better

understanding of the issues before this Board. In the Board's view only those costs relating to the actual preparation of the Higgs' Application and the costs incurred by Mr. Blackburn's actual appearances before the Board should be allowed. Costs relating to negotiations in 1974 and the preparation of evidence, which was withdrawn, should not be allowed. The Board rejects Union's claims for costs against the Higgs in connection with this matter.

The Board will not award or charge costs of the Application to Rescind to any participant. Such costs are also to be segregated and deleted by Mr. Giffen.

Subject to the directions set forth above the Board orders Union to pay to those successful Applicants the reasonable legal, appraisal and other costs actually incurred by them for purposes of determining their status before the Board; also reasonable legal, appraisal and consultants costs in relation to the determination of compensation payable. The Board also orders that the determination of the amount of such costs be referred to a Taxing Officer of the Supreme Court of Ontario for taxation. The costs and expenses of the Board in this hearing will be charged to Union.

Order

An order, in accordance with these Reasons for Decision, will issue in due course.

DATED at Toronto this 16th day of July, 1982.

ONTARIO ENERGY BOARD

S. J. Wychowanec
Vice Chairman

J. C. Butler
Member

Appendix A